

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

GOOGLE INC v DUFFY

[2017] SASCFC 130

Judgment of The Full Court

(The Honourable Chief Justice Kourakis, The Honourable Justice Peek and The Honourable Justice Hinton)

4 October 2017

DEFAMATION - PUBLICATION - GENERALLY - INTERNET PUBLICATIONS

DEFAMATION - PUBLICATION - GENERALLY - REPUBLICATION

DEFAMATION - PRIVILEGE - QUALIFIED PRIVILEGE - IN GENERAL

DEFAMATION - JUSTIFICATION - TRUTH - SUBSTANTIAL TRUTH AND CONTEXTUAL TRUTH

DEFAMATION - DAMAGES - GENERAL DAMAGES - ASSESSMENT - IN GENERAL

Appeal against a judgment that Google Inc (the appellant) defamed Dr Janice Duffy (the respondent) by publishing information which was the result of using the appellant's search engine to search the respondent's name.

The respondent paid for and received psychic readings over the internet. Those readings were false. The respondent engaged in an online conflict with the psychics. Defamatory articles about the respondent, calling her among other things a 'psychic stalker' and referring to her conflict with psychics were published on a website called the Ripoff Report (the Ripoff Reports). Other websites published material which derived from articles on the Ripoff Report (collectively the underlying webpages). When the appellant's search engine was used to search the respondent's name it reproduced content from, and hyperlinked to, the underlying webpages (the paragraphs). The Autocomplete function of the search engine also produced an alternate search term 'Janice Duffy Psychic Stalker'.

On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE JUSTICE BLUE) (2015) 125 SASR 437; [2015] SASC 170; [2015] SASC 206

Appellant: GOOGLE INC Counsel: MR T BLACKBURN SC WITH MS L DE FERRARI - Solicitor: HWL EBSWORTH LAWYERS

Respondent: JANICE MARGARET DUFFY Counsel: MR P HEYWOOD-SMITH QC WITH MR T GUTHRIE - Solicitor: JOHNSTON WITHERS

Hearing Date/s: 04/05/2016 to 06/05/2016

File No/s: SCCIV-14-18

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In September 2009, the respondent requested that the appellant remove the paragraphs. The appellant did not take steps to remove the paragraphs until March 2011.

The Judge found that the appellant was a secondary publisher of some of the paragraphs from the time that the respondent had notified it that the search engine was producing the paragraphs. The Judge found that no relevant defences had been established. In a later trial, the Judge awarded the respondent \$115,000 inclusive of interest in general damages but did not make an award for loss of earning capacity.

The appellant appeals the Judge's findings as to liability. The respondent cross-appeals the quantum of damages and seeks a higher award.

Held per Kourakis CJ (Peek & Hinton JJ agreeing):

- (1) The Judge was correct to find that the appellant was a secondary publisher of the relevant paragraphs and knowledge of those search results should not be attributed to the appellant until notice is given.
- (2) The search results published by the appellant incorporated the defamatory material contained in the Ripoff Reports because it facilitated the reading of the defamatory material in a substantial and proximate way.
- (3) The fact that the defamatory imputations were contained in search results which repeated material from the underlying pages does not deny their capacity to convey a defamatory meaning.
- (4) To justify the imputation that the respondent stalked psychics the appellant had to show that the respondent persistently did, or had a strong proclivity to, make unlawful or improper posts on the internet which were calculated to shame or denigrate psychics or cause them substantial distress. On the facts the respondent stalked only one psychic on a single occasion and so the truth of the imputation was not justified.

Per Peek J (Hinton J agreeing) dismissing the appeal:

- (1) The Judge correctly delineated "the platform of facts" from which an inference of publication can be drawn and correctly found that three publications to Ms Palumbo and publications to "a substantial number of persons unknown" were established.
- (2) For an individual to have an "interest in having information on some subject" sufficient to satisfy s 28(1)(a) of the Defamation Act 2005 the interest must be more than a matter of mere curiosity. A user does not, by merely entering a search term into a search engine, establish an interest so as to satisfy s 28(1)(a).
- (3) It is insufficient to satisfy s 28(1)(b) that the words were published at the same time as words giving readers information about a relevant subject; there must be a "sufficient connection" between the defamatory words and the subject of interest.
- (4) In relation to the three publications to Ms Palumbo, the Judge was correct in finding that the statutory defence of qualified privilege did not apply because the defendant did not prove that the defamatory matter was published in the course of giving her information on the subject of smoking. For the second and third publications, the defence did not apply for the additional reason that it was not proven that there was an interest within the meaning of s 28, rather than the searches being made from curiosity alone.
- (5) Each cause of action in relation to the publications to the "substantial number of persons unknown" was made out unless the defendant proved qualified privilege in respect of each cause of action, which it failed to do. The requirements of s 28 must be applied to the facts of each publication; absent proof, it cannot be assumed that those who entered the search terms had the sort of interest in a subject required by the section, nor that the

defamatory matter was published to them in the course of giving them information on that subject.

(6) In respect of each publication, having regard to the criteria provided for in s 28(3), including the actions of the defendant towards the plaintiff throughout her efforts to have the defamatory search results removed, s 28(1)(c) was not satisfied as the defendant did not prove that its "conduct in publishing the matter [was] reasonable in the circumstances". The trial Judge correctly found as such.

Per Kourakis CJ (contra):

(1) The Judge was correct to find that the appellant had published the search results to a substantial number of users. However, on the evidence the Judge overstated the number of people to whom the search results were published.

(2) The onus on the defendant is to prove the circumstances that render the publication an occasion of qualified privilege.

(3) The first class of persons to whom the paragraphs were published and who used the appellant's search engine to search for the respondent's name were in, or considering entering into, professional, commercial, employment or personal association with her.

(4) The second class of persons to whom the paragraphs were published and who used the appellant's search engine to search for the respondent's name were interested in the controversy between the respondent and the internet psychics.

(5) The paragraphs were published to the first and second class of persons on a matter in which they had a legitimate interest in circumstances which were reasonable pursuant to s 28(1)(c) of the Defamation Act 2005 (SA).

(6) It is not possible on the evidence to find that a relevant search was undertaken by a person who did not a member of one of those two classes.

(7) The appellant has established the defence of statutory qualified privilege.

Per Kourakis CJ (Peek & Hinton JJ agreeing), dismissing the cross-appeal:

(1) The quantification of damages is a discretionary exercise, the respondent has not established that the award of damages was manifestly inadequate.

(2) The Judge was correct to find that the respondent's failure to seek employment was independent of the appellant's publication of the defamatory material.

(3) The appellant's failure to apologise and continued plea of justification is not a basis for the award of aggravated damages.

Obiter, per Kourakis CJ:

(1) The tort of defamation requires that the defendant knows that the work contains defamatory material.

(2) That knowledge is presumed conclusively in the case of a primary publisher.

(3) That knowledge may be rebutted by a secondary publisher who does not know and could not reasonably have known of the presence of the material.

Obiter, per Hinton J:

(1) The elements of the tort of defamation differ depending upon whether the defendant is either a primary or subordinate publisher.

(2) Where the tort is committed by a primary publisher, no mental element attaches to the act of publication (other than that necessary to establish the act to be voluntary), hence the first ingredient of the tort is one of absolute liability.

(3) Where the tort is committed by a subordinate publisher, the subordinate publisher is presumed to have published the material knowingly unless he or she can establish that they did not know, and could not reasonably have known, of the content of the material (the defence of innocent dissemination). Thus, where the publisher is a subordinate publisher, the first ingredient of the tort is one of strict liability in that the plaintiff need not prove any mental element to succeed, but a defendant can avoid liability by making out the defence of innocent dissemination.

(4) As to qualified privilege, the application of the statutory defence in this case turns on the actual interest possessed by Google search engine users searching “Dr Janice Duffy” or “Janice Duffy” between January 2010 and late 2010. The search terms used do not allow one to characterise the searcher’s interest as anything less than an interest in the respondent. That it would be so limited is highly improbable. The evidence does not support a finding on the balance of probabilities that the search engine users making the relevant searches possessed an interest falling within s 28(1)(a) of the Defamation Act 2005.

Defamation Act 2005 (SA) s 3, s 28; *Defamation Act 1974* (NSW) s 20, s 22, referred to. *Phillips v Police* (2016) 125 SASR 427, applied.

ACCC v Trading Post (2011) 197 FCR 498; *Adam v Ward* [1917] AC 309; *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357; *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299; *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30; *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366; *Blatch v Archer* [2015] FCA 652; *Bunt v Tilley* [2006] EWHC 497 (QB); *Byrne v Deane* [1937] 1 KB 818; *Crookes v Newton* [2011] 3 SCR 269; *Chappell v TCN Channel Nine P/L* (1988) 14 NSWLR 153; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; *Echo Publications v Tucker (No 3)* [2007] NSWCA 320; *Guise v Kouvelis* (1947) 74 CLR 102; *Hockey v Fairfax Media Publications P/L* [2015] FCA 652; *Horrocks v Lowe* [1975] AC 135; *Howe & McColough v Lees* (1910) 11 CLR 361; *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227; *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188; *Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtechinca Corp (trading as Digital Trends)* [2009] EWHC 1765 (QB); *Morgan v Odhams Press* [1971] 2 All ER 1156; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749; *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374; *Oriental Press Group Limited v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366; *Papaconstuntinos v Holmes à Court* (2012) 249 CLR 534; *Roberts v Bass* (2002) 212 CLR 1; *Rogers v Nationwide News* (2003) 216 CLR 327; *Sands v State of South Australia* [2011] SASC 146; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Stone v Moore* (2016) 125 SASR 81; *Tamiz v Google Inc* [2012] EWHC 499 (QB); *Tamiz v Google Inc* [2013] 1 WLR 215; *Telegraph Newspaper v Bedford* (1934) 80 CLR 632; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533; *Urbanchich v Drummoyne Municipal Council & Another* (1991) Aust Tort Reports 81-127; *Webb v Bloch* (1928) 41 CLR 331; *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, discussed.

A v Google New Zealand [2012] NZHC 2352; *Aktas v Westpac Banking Corporation Limited* [2010] HCA 47; *Cush v Dillon* (2011) 243 CLR 298; *Emmens v Pottle* (1885) 16 QBD 354; *Emmerton v University of Sydney* [1970] 2 NSWLR 633; *Griffith v ABC* [2010] NSWCA 257; *Macintosh v Dun* (1908) 6 CLR 303; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366; *Pritchard Englefield (A Firm) v Steinberg* [2005] EWCA Civ 288; *Rana v Google Australia Pty Ltd* [2013] FCA 60; *Restifa v Pallotta* [2009] NSWSC 958; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; *Vizetelly v Mudie’s Select Library Ltd* (1900) 2 QB 170; *Wishart v Murray* [2013] 3 NZLR 246, considered.

GOOGLE INC v DUFFY
[2017] SASCF 130

Full Court: Kourakis CJ, Peek and Hinton JJ

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KOURAKIS CJ.**Introduction**

1 This is an appeal by Google Inc (Google), the operator of an electronic search engine on the World Wide Web. Google appeals against a judgment that it defamed the respondent, Dr Duffy, by publishing to a substantial number of people information which was the result of using Google's search engine to search her name. The search results were published in paragraphs which reproduced extracts from webpages. Those webpages, and accordingly the extracts, referred to Dr Duffy as a 'psychic stalker'. Some extracts also accused Dr Duffy of misusing the office equipment of her employer, but the Judge found that that imputation was justified. The Judge awarded Dr Duffy \$115,000.00, inclusive of interest, in general damages but did not make an award for loss of earning capacity. Dr Duffy cross-appeals against that award.

2 I agree with the Judge's conclusion that Google was a secondary publisher of the paragraphs of both the search results and two of the underlying webpages from the time it was put on notice that its search engine was producing those results. I accept that the Judge was correct to find that the contents of the paragraphs, and their publication to a substantial number of persons, can be inferred from the search results printed out by Dr Duffy and from the evidence about the operation of the World Wide Web. I would affirm the Judge's finding that the nature of the publication of search results does not negate the defamatory imputation which the paragraphs carry on their face. I also accept that the Judge correctly found that Google failed to justify the imputations that Dr Duffy stalked and harassed psychics. Dr Duffy's posts were almost entirely robust, but not improper, criticisms of certain internet psychics. The single proved instance of improper harassment of one of the psychics did not justify the imputation because Dr Duffy was not shown to repeatedly engage in improper harassment or stalking or to have a proclivity to do so.

3 However, I have concluded that the Judge erred in finding that the persons to whom the paragraphs were published did not have a legitimate interest in the information conveyed by the search results. Publication through a search engine on the internet differs in an important respect from publication by the mass media in that it is published only to persons who search for the information provided. The evidence supports the conclusion that the persons to whom Dr Duffy proved, circumstantially, publication of the Google search result paragraphs were either in family, social, professional or business relationships with Dr Duffy, or were followers of the controversy between Dr Duffy and a number of internet psychics. Dr Duffy failed to prove that persons, other than those who had a legitimate reason to be informed about her on-line dispute with internet psychics, searched for her name and read the Google search results which carried the pleaded imputations. The evidence did not support a finding that the impugned paragraphs were published to a person with respect to whom Google could not show an interest greater than idle curiosity.

4 Furthermore Google's conduct in publishing the paragraphs to persons with a legitimate interest in the material they contained was reasonable in that:

- Google's internet search engine provided an important resource to the public; and
- even after it was notified of the nature of the paragraphs produced by its search engine it had no reason to conclude that the paragraphs were being published to persons with no legitimate interest in them or that the publishers of the material summarised in them were actuated by malice.

5 Dr Duffy's claim should therefore be dismissed.

6 If the judgment on liability were affirmed, I would not have interfered with the award of damages.

7 My reasons follow.

Psychics and romantic disappointment

8 The events out of which the publication of the paragraphs arose can be briefly described. Dr Duffy is a medical researcher. In mid-2005, Dr Duffy met a man called Jon in New York and hoped that they might become romantically involved. From August 2005, Dr Duffy consulted and paid on-line psychics searching for prophetic reinforcement of her own hopes. She found it in spades. The psychics she consulted operated on a website known as Kasamba where psychics provided paid advice to clients. Some of the psychics on Kasamba went by the on-line pseudonyms of Master Z, Fruno, Powerful Visions (the psychic formerly known as Soul Connection to Dr Duffy), SunShiningUponYou (Sun). Bereft of any Delphic subtlety, they unanimously and unambiguously predicted a positive relationship.

9 Fruno, Powerful Visions and Master Z continued to predict a positive relationship, even after Dr Duffy reported to them that Jon had informed her by email in March 2006 that he had fallen in love with a married woman, doubted that he would come to Australia and wondered whether he even wanted to see Dr Duffy again. In December 2006 and January 2007, Sun continued to encourage Dr Duffy to believe that there was an amazing month ahead for Jon and Dr Duffy.

10 They were all wrong. In January 2007 Jon informed Dr Duffy that his girlfriend had divorced her husband, that he was enjoying his life and could not promise that he would ever return to Australia. When, in May 2007, Jon finally ended any hope of a relationship, Dr Duffy fell into a deep depression.

11 In June 2007, Dr Duffy started writing a report about her experiences with the psychics which she never published. She also complained to various

psychics on Kasamba about her disappointment. On 18 July 2007, Dr Duffy posted complaints on a website called 'the Ripoff Report' against psychics including Master Z, Fruno and Powerful Vision. The Ripoff Report website enables persons who register with it to post a consumer complaint on the website about a supplier of goods or services. The website allows others to post support for the maker of the complaint. It also allows the supplier, or a supporter of a supplier, to respond to the complaint. The Ripoff Report website was also the source of information which was republished on the 123 People website, a website designed to find information about people on other websites and reproduce it.

12 On 29 July 2007, Dr Duffy created a chat group on yahoo.com for the purpose of enabling persons with complaints about Kasamba psychics to publish their experiences. The chat group was known as 'kasambavictims'.

13 In September 2007, Dr Duffy communicated with Sun through the Kasamba website complaining about the previous predictions concerning Jon.

14 In December 2007, Dr Duffy, using the pseudonym Oswald Billet and the username 'ozzieb', posted messages to Sun using the Kasamba website. Billet claimed that his wife's friend committed suicide on 17 December 2007 because of the dashing of romantic expectations which had been engendered by Sun. Under the ozzieb pseudonym Dr Duffy claimed that Sun was responsible for the death of his wife's friend because she had been deliberately given false hope that she would be with someone who was married. Ozzieb threatened to inform the head of Kasamba, and the national media, of Sun's wrongdoing. Sun did not respond. On 19 December 2007, again using the Oswald Billet pseudonym, Dr Duffy emailed Kasamba complaining that Sun's wrongdoing had led to the suicide of his wife's friend.

15 On 28 December 2007, Dr Duffy, under the user name 'Friend's Husband' posted a report on the Ripoff Report about the suicide of his wife's friend and complaining about Sun's involvement in it.

16 On 30 December 2007, a person using the name 'Mary anne' posted a report on the Ripoff Report which described Dr Duffy as a psychic stalker and complained about Dr Duffy's stalking of Kasamba's internet psychics. On the same day, a person calling herself 'Mary Anne' responded to the report of 'Friend's Husband' of 28 December 2007 claiming that it was a false report posted by Dr Duffy. More posts on the Ripoff Report followed, the posts complained about Dr Duffy's stalking of psychics and referred to her as a 'psychic stalker'. Dr Duffy became aware of the adverse reports on the Ripoff Report after being informed about them by a member of the Kasamba victims' group.

17 On 23 March 2008, Dr Duffy, using a male pseudonym, engaged Master Z in an on-line chat session on the subject of finding a romantic partner. The very

next day, Dr Duffy participated in another exchange with Master Z in which she accused Master Z of posting scripted readings. On the same day, Dr Duffy, using the pseudonym 'Aussieboy' posted a complaint about Master Z's conduct, including the scripted responses, on the Ripoff Report website. She posted a further report using the pseudonym 'Gretal' on 26 March 2008. Sometime later in 2008, Dr Duffy under the username 'Janice', also posted complaints on the Ripoff Report about Fruno, Master Z and Powerful Visions. The evidence of these postings, in the form of hardcopy screen shots, was received by consent as Exhibit D5. The material in Exhibit D5 was said by counsel for Google to relate to the stalking and harassing imputation. The receipt of that exhibit was not conditional. Contrary to a submission put by Dr Duffy on the appeal, the Judge's adverse rulings on amendments to Google's defence did not limit the admissibility or use of the documents in Exhibit D5 for these purposes.

18 Even though at the time of the receipt of Exhibit D5 Dr Duffy had been under cross-examination over many days, Dr Duffy consented to the admission of Exhibit D5 after the Judge allowed a short adjournment for Dr Duffy to consider her position. On the appeal Dr Duffy contended that the Judge wrongly found that she had posted the accusations against Sun. That contention should be rejected. Dr Duffy admitted doing so. Moreover, the Judge was entitled to reject Dr Duffy's testimony that the information in those posts was true and had been given to her by others whom she believed. The Judge was entitled to infer from Dr Duffy's own testimonial admission to campaigning against the internet psychics and her inability to verify the identity of her informants, let alone their precise accusations, that she had fabricated the contents of her posts.

19 Dr Duffy's on-line activities generated much internet material in which she was accused of being a psychic stalker. Google's search engine identified, hyperlinked, and reproduced extracts of the web pages containing responses to Dr Duffy's complaints. It was on the material reproduced by the search engine that Dr Duffy based her claims.

20 From herein when I refer to the trial Judge's reasons, I refer to his Honour's reasons on liability.¹ When I refer to the other reasons, for example the reasons on damages, I will specify.

The Google search engine

21 The general operation of the World Wide Web and the Google search engine is described in the reasons for judgment of Blue J.² I cannot improve on his Honour's exegesis and there is little reason to attempt to summarise it given the contemporary widespread familiarity with the internet.

22 It is necessary, however, to set out the way in which Google displays its search results. The Google search results were referred to by the Judge as

¹ *Duffy v Google Inc* (2015) 125 SASR 437.

² *Duffy v Google Inc* (2015) 125 SASR 437 at [23]-[42].

paragraphs. Examples of search results printed off by Dr Duffy and received into evidence appear in [11]-[13] of the Judge's reasons.³ Each paragraph comprises a number of elements. At the time Dr Duffy was searching, each paragraph had a unique electronic address referred to as a Uniform Resource Locator (URL) which acted as an electronic digital link (hyperlink) to the website to which it referenced (the underlying webpage). Clicking the mouse on an hyperlink accesses and displays the underlying webpage, including any written and pictorial materials contained on it. Each paragraph also has a title which is itself derived from the underlying webpage, and reproduces a selection of text from that webpage (the snippet). The title also operates as a hyperlink.

23 The results displayed in response to a Google search are not static webpages. They are generated on each occasion that a user conducts a search and appear only on the screen of the searcher's electronic device. They do not subsist on the World Wide Web after the search is made.

24 Google can, and could at all relevant times, prevent its search engine displaying search results referring to a particular webpage if it were provided with that webpage's specific URL. By way of example, an aggrieved person could provide the URL to Google, or, the URL could be discovered by successfully searching for the webpage by reference to any information provided about that website. Blocking a URL has the effect that a search, using any search terms, will not produce a result referable to the webpage which has that particular URL. For instance, if a page were blocked at Dr Duffy's request because it contained defamatory material, but it also contained Dr Duffy's responses to that material describing her as a stalker then when someone later searched for a combination of search terms designed to return results relating to the criticism of internet psychics that page or URL would not be retrieved as a search result. That consequence is important because it shows that a step which would absolve Google of liability would deny access to information in which many persons may have a legitimate interest.

25 However, URL's can be changed, and are, in fact, often changed by administrators of websites (web-masters). Indeed, there was evidence that the URL of the first Ripoff Report webpage changed in about June 2013.

26 Google cannot block search results by using the search terms themselves except for searches conducted in the nations of the European Union or on European Union domains. That technology was adopted by Google following the decision of the European Union Court of Justice in *Google Spain v AEPD and Mario Costeja Gonzalez* which established a 'right to be forgotten' for individuals.⁴ The technology allows Google to block search results linked to a specified URL if the search enquiry includes a particular name. The evidence showed that there are a number of persons with the name Janice Duffy. Other

³ *Duffy v Google Inc* (2015) 125 SASR 437.

⁴ *Google Spain v AEPD and Mario Costeja Gonzalez* (C-151/12) [2014] ECLI:EU:C:2014:317.

than the appellant, one of those persons uses the title 'Dr'. The name blocking technology could not be used to block the paragraphs defamatory of Dr Duffy without 'overblocking' search results with respect to other persons with the same name, but there was no evidence that those other persons were mentioned on the relevant webpages.

27 However, if that technology were available and deployed at the relevant time, it would have denied persons who had an interest in the specific controversy between Dr Duffy and the internet psychics, the capacity to search for the webpages by entering her name as the search term.

28 The issue of overblocking bears on the reasonableness element of statutory qualified privilege with which I deal in [308]-[326] below.

29 From 2014, Google implemented a system whereby it could prevent specified autocompletions of search queries being presented to a user when the Autocomplete facility predicted that the user was typing a person's name in the search box. However that technology did not block an actual search of that same material using those search terms. That technology merely prevented the autocompletions from being shown to the user.

30 Dr Duffy printed in hardcopy the results of many of her searches. Those printouts were received into evidence. However, the actual search results displayed on the screen of Dr Duffy's computer could not be seen or accessed by anyone else and were therefore not published to any other person. Nonetheless they established an evidential foundation for an inference, drawn by the Judge, that others who conducted a search with the same search terms would have seen a display of the same search results.

Google is notified

31 • After Dr Duffy discovered that Google searches were generating paragraphs in which she was described as a psychic stalker she complained to Google and asked it to remove the links it was providing to the webpages where she was so described. Dr Duffy made her first request by email on 7 September 2009. Dr Duffy did so again on 8 September 2009 identifying the source webpage by name and URL. In mid-September Google requested Dr Duffy to provide more particulars of the material of which she complained. Dr Duffy provided that information no later than 23 September 2009. On 7 October 2009 Google responded (wrongly) that there was nothing it could do without the cooperation of the sites' webmasters. Only in March 2011, after Dr Duffy instituted this action, did Google block paragraphs containing the abstracts which the Judge ultimately found were defamatory from searches made using its Australian website.

32 The Judge found that Dr Duffy's email of 8 September 2009 provided sufficient information to enable Google to prevent its search engine from

producing paragraphs which reproduced parts of the relevant Ripoff Reports. The Judge also found that on 22 September 2009 Dr Duffy provided sufficient information for Google to prevent the generating of paragraphs referring to the 123 People webpage. Neither finding is challenged. The Judge found that Google could reasonably have prevented the search engine from doing so by 7 October 2009. That finding is not challenged. Dr Duffy complained faintly that less time might have been allowed but any lesser period would only marginally affect the quantum of damages.

Direct and circumstantial evidence of publication

33 Apart from her own searches, Dr Duffy also adduced direct evidence of the publication of the results of a Google search of Dr Duffy's name from the witness Theresa Palumbo, who was Dr Duffy's hairdresser. Ms Palumbo's evidence was accepted by the Judge.

34 A statement given by Ms Palumbo was received into evidence as exhibit P15. Ms Palumbo states that she knew that Dr Duffy was a health researcher and had researched chronic lung disease and the health effects of smoking. Ms Palumbo was aware that Dr Duffy had published papers with 'a professor who was a leading expert in this field in Australia'. Ms Palumbo's statement records that when Dr Duffy attended to have her hair done on 25 June 2010 they discussed Ms Palumbo's desire to give up smoking.

35 The statement records that Dr Duffy suggested that Ms Palumbo search the internet for details of the professor to access his published work. The statement continues that when Ms Palumbo decided to conduct the search that night she could not remember the professor's name. She then typed the words or some combination of the words 'Dr Janice Duffy' into the search engine. The search results revealed paragraphs referring to Dr Duffy as an 'Australian psychic stalker'.

36 In her evidence, Ms Palumbo gave a slightly different account in answer to questions directly from Dr Duffy, who was then representing herself, omitting any reference to attempting to search for the professor's name.

Q You have been my regular hairdresser ever since [2009].

A Yes.

Q I haven't deserted you. Now you were aware of like girls talk at hairdressers and you know I chat etc. You were aware of my WorkCover issue.

A Yes.

Q But you were also aware of the nature of my work at that time.

A Yes.

Q And what was that.

A You were a researcher Health Department [sic].

Q Into COPB, I mean you know lungs.

A Yes.

Q Did we have an occasion to have a discussion sometime in the middle of 2010.

A Yes, we did because I was in the middle of trying to give up smoking.

Q It's hard I know.

A And I booked an Allen Carr Seminar and I happened to tell you about it and you mentioned that you published a paper on the effects on smoking on lungs.

Q Did I say, you know, give any details about the publication.

A You said that if I wanted to look at it that I could look it up on line, so I Googled it.

Q Now what did you actually Google.

A I Googled Janice Duffy.

37 Ms Palumbo then proceeded to testify as to the search results.

38 Ms Palumbo's statement records that shortly after making that search she informed Dr Duffy of the contents of the search results. Dr Duffy told her that 'she was already aware of the results, and that she had been trying to get them removed for some time'.

39 The Judge found that Ms Palumbo first searched for Dr Duffy's name to find the article to which Dr Duffy had referred. The Judge also found that the paragraphs Ms Palumbo read related to what he described as the first and second Ripoff Report webpages because those reports referred to Dr Duffy as an 'Australian psychic stalker' or a 'psychic stalker' from Australia. The Judge also relied on the fact that the hard copy printed pages of Dr Duffy's searches, which were conducted between January and October 2010, did not contain any reference to what was described as the third to sixth Ripoff Reports in the first few pages of search results.

40 The Judge therefore found that Ms Palumbo had seen at least the following paragraphs after making her Google search in June 2010:⁵

First Ripoff Report

Janice Duffy – Psychic Stalker Psychics Beware Of...

Psychics beware of psychic stalker Janice Duffy...

www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached

⁵ *Duffy v Google Inc* (2015) 125 SASR 437 at [268]-[269].

Second Ripoff Report**Rip-off Report Dr Janice M Duffy**

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice M Duffy Adelaide South Australia Adelaide South Australia

www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm

Cached

41 Ms Palumbo's statement continues that sometime in around 2012, Dr Duffy mentioned that the Google search engine still loaded a page that contained results with derogative comments similar to those which she had come across in June 2010. Shortly after that conversation Ms Palumbo again Googled 'Dr Janice Duffy' and discovered similar search results. In order to make that search Ms Palumbo entered Dr Duffy's name as the search term, however her statement does not mention any auto complete results.

42 However, in her evidence Ms Palumbo referred to another search she made in-between the two searches mentioned in her statement:

Q Did you at any other time between then and now do a search for my name.

A Yeah, curiosity gets the better of you. You want to see if it is still there and yes, I did.

Q When was that.

A I think I did it a few months after and of course I did it again this year, yeah. Even as I sort of start to type your name psychic stalker comes up straight away basically, yeah.

Q Where would that be.

A That's in the little search box, you know the Google auto – you know how you type.

Q Auto complete, yes.

A It thinks of what you want before you think of it.

43 Ms Palumbo testified that search results similar to those she first found were again displayed.

44 In cross-examination Ms Palumbo gave the following explanation for her search on the second occasion:

Q The second time you searched, was that as a result of a conversation you had with Dr Duffy.

A No, it was more curiosity.

Q Are you sure it wasn't a case that she mentioned to you that it was still on Google and that is what prompted you to do the search.

A No, we only talked about it a couple of times that year because she was trying to have it removed and then it was removed I think, and then just – it was just one day, you know, as you are on the computer, I just thought ‘I wonder if that’s still there’ and then I found it again; I searched for it and it was there again.

45 The Judge did not make any finding as to the reason for Ms Palumbo’s second search. Ms Palumbo’s interest or reason for conducting the searches in 2010 can be summarised as follows.

46 On the first occasion Ms Palumbo’s interest was to find the article on chronic lung disease to which Dr Duffy had contributed. For reasons on which I elaborate below, there is a sufficient connection between the publication of the debate between Dr Duffy and the internet psychics and a Google search for articles authorised by Dr Duffy such that Ms Palumbo’s enquiry would constitute an occasion of qualified privilege. The material was therefore published in the course of, and on an occasion of, qualified privilege.

47 Ms Palumbo’s interest on the second occasion was to ascertain whether Google had acceded to the requests of which she had been informed by her client and acquaintance Dr Duffy, to block search results with derogatory references to Dr Duffy. Ms Palumbo’s curiosity was not merely idle or that of an intermeddler. It arose from Dr Duffy confiding in her of attempts to have the results removed. For reasons on which I elaborate below, the search results with which she was provided fell within an occasion of qualified privilege constituted by her request to ascertain whether the material critical of her acquaintance was still being published.

48 The Judge found by inference from the search results tendered by Dr Duffy that Ms Palumbo saw the following paragraphs in late 2010 which referred to the first and second Ripoff Reports:⁶

Janice Duffy – Psychic Stalker! Psychics Beware Of...

Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher ...
www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached

Rip-off Report Dr Janice Duffy ...

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide South Australia Adelaide South Australia
www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm
Cached

The Judge also found that whilst conducting the search in 2012 Ms Palumbo saw words referring to Dr Duffy as a psychic stalker generated by Google’s autocomplete function.

49 The Judge accepted that Ms Palumbo conducted the search in 2012 and that that that search was prompted by a conversation with Dr Duffy:⁷

⁶ *Duffy v Google Inc* (2015) 125 SASR 437 at [274].

[277] I find that Ms Palumbo chose to undertake the search in 2012 of her own volition and was not asked to do so by Dr Duffy, although what led her to undertake the search was a conversation with Dr Duffy during which Dr Duffy said that the Google search engine still loaded search results containing derogatory comments about her.

50 That search too constituted an occasion of qualified privilege for the same reasons the second search did.

51 The Judge rejected Google's contention that the publication to Mr Palumbo was not defamatory because Ms Palumbo did not believe the allegations to be true.⁸

[282] I reject Google's contention. It is well established that publication is complete and the cause of action in defamation is good even if the publishee does not believe the imputation or give it any credence. Google's proposition of law summarised in the previous paragraph was rejected by the English Court of Appeal in *Dow Jones & Co Inc v Jameel*. The doctrine developed and applied by the Court of Appeal in that case, namely that it may be an abuse of process to sue for defamation when the publication has been minimal and caused no significant damage to the claimant's reputation such that the expense of an action is disproportionate to the available remedy, is inconsistent with Google's proposition of law.

[283] I accept (without deciding) that there might not be an actionable publication if a plaintiff instigates a friend to access from a website defamatory matter solely for the purpose of the plaintiff relying on it as publication to give rise to a cause of action. However, while Ms Palumbo made her search in 2012 following and as a result of Dr Duffy telling her that the defamatory material was still on the internet, she nevertheless made that search of her own volition and it was not instigated by Dr Duffy.

(citations omitted)

52 The Judge found that Ms Palumbo also conducted a search in April 2015 but was not satisfied that Ms Palumbo saw a paragraph on which Ms Duffy had sued and in respect of which she had notified Google. However, the Judge accepted Ms Palumbo's evidence and found that there had been a publication in April 2015 by Google through its auto-complete function on that occasion. Ultimately he dismissed Dr Duffy's action based on publication by the auto-complete function for different reasons.

53 Accordingly, the Judge found that Google published to Ms Palumbo:

- 1 The first and second Ripoff Report webpages and paragraphs relating to them in June 2010 and late 2010; and
- 2 The autocomplete term 'Janice Duffy psychic stalker' in 2012 and 2015.

⁷ *Duffy v Google Inc* (2015) 125 SASR 437 at [277].

⁸ *Duffy v Google Inc* (2015) 125 SASR 437 at [282]-[283].

54 To circumstantially prove a wider publication, Dr Duffy tendered screenshots of readable data generated by a Google website known as ‘Google AdWords’ (the AdWords data and site). Dr Duffy gave evidence that on 1 September 2011 she used the Keyword Tool on the AdWords website to search for data showing the number of average monthly searches made from Australia and the average monthly searches made globally for her name over the preceding 12 months by enquiring into the phrases ‘Janice Duffy’ and ‘Dr Janice Duffy’.

55 Dr Duffy made enquiries for both a ‘Broad Match’ search and ‘Phrase Match’ search. A Phrase Match search is conducted by either entering the phrase in inverted commas or checking the Phrase Match box and generates data on searches using the exact phrase or a close variation thereto. A Broad Match search is conducted by entering the words without using inverted commas or any other punctuation, or checking the relevant box. A Broad Match generates a search for words entered (in any order), a close variation, related searches or any other relevant variation. Enquiries for Janice Duffy using both Broad Match and Phrase Match search types showed 480 Australian monthly searches and 1,300 global monthly searches. Enquiries for ‘Dr Janice Duffy’ using the Broad Match function revealed 260 Australian searches and 320 global searches, monthly. The Phrase Match function identified 210 Australian searches monthly and 260 global searches monthly.

56 Dr Duffy conducted further Keyword Tool inquiries of the AdWord website. The Judge tabulated the Australian AdWord data of the number of monthly searches at [307] of his reasons. I reproduce the table below and I add to it, in chronological order, events, as found by the Judge, which may have affected the number of searches and from which the reasons for some searches may be inferred.⁹

Date	Match type	Janice Duffy	Dr Janice Duffy	Janice Duffy psychic stalker
16.2.2011	Action instituted			
1.9.2011	Broad (Phrase)	480 (480)	260 (210)	
9.10.2011	Dr Duffy creates a blog referring to the internet defamation of her among other things			
21.11.2011	Article in The Australian referring to Dr Duffy’s action			
2.3.2012	Broad	880	390	91
2.4.2012	Articles in The Age and Sydney Morning Herald about Dr Duffy’s action against Google.			
April 2012	Mr Trkulja uses Google to search for Dr Duffy and Janice Duffy.			

⁹ *Duffy v Google* (2015) 125 SASR 437 at [307].

29.8.2012	Broad (Phrase)	590 (590)	260 (210)	
26.10.2012	Broad	590	260	46
13.6.2013	Broad	320	140	110

57 I mention with respect to that table that the Broad Match search numbers for the terms 'Janice Duffy' and 'Dr Janice Duffy' necessarily include the Phrase Match for each search respectively. Moreover, the Broad Match search numbers, and probably the Phrase Match search numbers, for 'Janice Duffy' necessarily include the Broad Match search numbers for 'Dr Janice Duffy'. It follows that the total search numbers are those for the Broad Match search of 'Janice Duffy'. Of those searches the number of Phrase Match searches for 'Dr Janice Duffy' indicates searches by persons who knew of Dr Duffy's academic qualification.

58 It is important to keep in mind that those numbers overstated the number of persons to whom search results were published because multiple searches might be undertaken by the same person, including Dr Duffy and her supporters.

59 A document generated by Google recording the number of searches of Dr Duffy's name from different devices conducted between 1 August 2013 and 31 October 2014 was received into evidence by consent. That document showed that between those two dates there were searches from a total of 278 different electronic devices for 'Janice Duffy' and searches from a total of 196 different electronic devices for 'Dr Janice Duffy' using the Google Australian search engine (the Google search data). Again, it is likely that the 196 electronic devices from which searches for Dr Janice Duffy were made are included in the devices from which searches for Janice Duffy were made. The importance of the Google search data is that it excludes multiple searches by the same person. Google did not produce a readout from its data bases showing the number of searches of the Google Australian website for the name Duffy from different devices before August 2013.

60 The Google data was obtained by specially interrogating Google's search engines for forensic purposes. In the ordinary course of Google's operations such data was not produced nor kept in readable form. The Google data was based on searches from unique internet protocol addresses (IP addresses) whereas the AdWord data counted multiple searches from the same IP address. Because the Google data left aside the possibility of multiple users of the same device, and therefore the same IP address, it was a better indication of the number of persons who made the relevant searches. It is evidence that the Google search results were published to a significantly smaller number of persons in the period after Dr Duffy attracted publicity to herself by instituting her action against Google than the number of searches shown in the AdWord data might otherwise have suggested.

61 The Judge found that data of that kind would have been available for as far back as at least the 12 months ending in March 2011 had Google chosen to generate and retain it upon being served with the summons by Dr Duffy. I return to that finding in [199]-[209] below.

62 The Judge found that there was no reason to believe that the number of searches increased dramatically between October 2009 and August 2011. However, the Judge observed that in October 2011 Dr Duffy created a blog on which she referred to the use of the internet to defame her and that in November 2011, there was also media publicity about her action against Google. The increase in searches from that time is demonstrated by the table. The Judge found that between October 2009 and February 2011 there were at least 100 monthly searches for ‘Dr Janice Duffy’ and at least 200 monthly searches for ‘Janice Duffy’:¹⁰

[310] The earliest period for which data is now available is from September 2010 to August 2011 referred to at [306] above. That data shows large numbers of searches being conducted for both “Dr Janice Duffy” and “Janice Duffy” over that period. There is no reason to believe that the number of searches increased dramatically between October 2009 and August 2011. By contrast, in October 2011 Dr Duffy began her blog and in November 2011 there was media publicity about this action which was likely to increase searches for Dr Duffy’s name and this is borne out by the table at [307] above. I find that between October 2009 and February 2011 there were at least 100 monthly searches for “Dr Janice Duffy” and at least 200 monthly searches for “Janice Duffy”.

63 Even though it is not clear, the Judge’s finding appears to be that there were an average of 300 searches monthly in the 12 months to, and including August 2011, 100 of which were for Dr Janice Duffy. Whichever finding was made, it was necessarily an estimate.

64 The Judge’s discounting of the number of searches was supported by evidence later given on the continuation of the hearing as to damages. A Google software engineer gave evidence that the Keyword Tool counted each move to a new page of results and each return to search results after visiting a hyper-linked web-page as a new search.¹¹ Indeed, that evidence perhaps makes the finding unduly favourable to Dr Duffy.

65 The Judge found that the searches in Australia on the Google Australian website for ‘Dr Janice Duffy’ were probably undertaken by persons searching for information about the plaintiff. She was the only ‘Dr Janice Duffy’ in Australia at the time. The Judge found that the inclusion of the title ‘Dr’ strongly suggests that the searcher was not searching for another Janice Duffy. I would add that the fact that a search is made for Dr Janice Duffy rather than Janice Duffy renders it less likely that it was randomly or idly made.

¹⁰ *Duffy v Google Inc* (2015) 125 SASR 437 at [310].

¹¹ *Duffy v Google Inc (No 2)* [2015] SASC 206 at [42].

66 It is important to observe, therefore, with respect to the Judge's finding that:

- there is a large degree, if not a complete, overlap between the searches;
- one in two of the enquirers were sufficiently familiar with Dr Duffy to know of her academic qualifications;
- searches may have been conducted from the same device or devices by the same person;
- searches in any one month may have been conducted by some of the persons who made searches in other months.

It follows that relatively few persons measurable in the hundreds, and not thousands, read the search results.

67 The Judge found that searches for 'Dr Janice Duffy' between January and December 2010 returned the following paragraphs relating to the second and first Ripoff Report webpages respectively:¹²

Janice Duffy – Psychic Stalker Psychics Beware Of...

Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher
...
www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm
Cached

Rip-off Report Dr Janice Duffy ...

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide,
South Australia Adelaide, South Australia
www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-
deb8p.htm Cached

68 The Judge found that it was likely that a significant proportion of persons searching for 'Dr Janice Duffy' read those paragraphs because the printout of the results of searches conducted in that time showed those paragraphs on the first page of results. The Judge rejected Google's contentions that Dr Duffy's search results were influenced by her earlier searches and might not have been typical of the paragraphs seen by other persons searching 'Dr Janice Duffy'. Google's appeal grounds complaining about those findings of fact are dealt with in [189]-[193] below.

69 The Judge also found that:

- a significant proportion of the persons whose searches returned those paragraphs relating to the first and second Ripoff Report webpages are likely to have read the paragraphs; and

¹² *Duffy v Google Inc* (2015) 125 SASR 437 at [312].

- a significant proportion of those persons who noticed the relevant paragraphs are likely to have followed the hyperlink to the Ripoff Report webpages.

70 The Judge found that a substantial number of persons in Australia conducted searches on the Google Australian website for the name 'Dr Janice Duffy' read the paragraphs relating to the first and second Ripoff Report webpages, and followed the hyperlinks to those webpages. The Judge concluded, therefore, that Google published the first and second Ripoff Report webpages and paragraphs relating to them to a substantial number of users between January and December 2010.

71 The Judge found that searches between January and December 2010 of the term 'Janice Duffy' would have produced at the least the following paragraphs relating to the first and second Ripoff Report webpages:¹³

First Ripoff Report

Janice Duffy – Psychic Stalker Psychics Beware Of...

Psychics beware of psychic stalker Janice Duffy...

www.ripoffreport.com/.../Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm

Cached

Second Ripoff Report

Rip-off Report Dr Janice M Duffy Stop the Australian Psychic ...¹⁴

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide, South Australia Adelaide, South Australia

www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm

Cached

72 The Judge, for similar reasons as those he gave for searches of the term 'Dr Janice Duffy', concluded that Google published the first and second Ripoff Report webpages, and paragraphs relating to them, to a substantial number of persons between January and December 2010, who had used Google to search the name 'Janice Duffy'.

73 The Judge was not satisfied that a substantial number of persons who conducted searches in the terms above read paragraphs relating to the third Ripoff Report webpage because those paragraphs appeared only intermittently in searches undertaken by Dr Duffy and when they appeared they generally appeared on pages after the first two pages of search results. Dr Duffy did not sue in respect of paragraphs relating to the fourth to sixth Ripoff Report webpages and, in any event, those paragraphs appeared rarely, if at all, in searches undertaken by Dr Duffy for those names.

¹³ *Duffy v Google Inc* (2015) 125 SASR 437 at [320]-[321].

¹⁴ In one variation, the words 'Stop the Australian Psychic' are replaced by the number '#295925'.

- 74 Searches of the name ‘Janice Duffy’ and ‘Dr Janice Duffy’ also generated paragraphs for another underlying webpage entitled Complaints Board but the Judge ultimately found that these paragraphs were not defamatory:¹⁵

Dr Janice Duffy Senior Researcher

Are you also a victim of the Dr Janice Duffy Senior Researcher? Submit a complaint to help other consumers to be educated and don't let them get away...
www.complaintsboard.com/.../dr-janice-m-duffy-senior-researcher-a55917.html
Cached

Dr Janice Duffy

Are you also a victim of the Dr Janice Duffy? Submit a complaint to help other consumers to be educated and don't let them get away with it!
www.complaintsboard.com/.../dr-janice-duffy-a55921.html Cached

- 75 The Judge found that Google published those paragraphs to a substantial number of persons searching for the term ‘Dr Janice Duffy’ between January 2010 and October 2011.¹⁶ Yet the Judge did not find that those paragraphs were published to persons who searched only the term ‘Janice Duffy’ because on a search of that name the Complaints Board paragraphs appeared only intermittently and when they appeared they generally appeared on pages after the first page of search results. The Judge was not satisfied that Google published any paragraphs to a substantial number of persons relating to any other Complaints Board webpages.

- 76 The printout of searches conducted by Dr Duffy between January and 16 October 2010 for ‘Dr Janice Duffy’ also showed paragraphs for an underlying website known as ‘123 People’. Those paragraphs had in common the following words:¹⁷

Janice Duffy – Email Address, Phone Numbers everything!

Dr Janice Duffy Stop the Australian Psychic Stalker Dr Janice Duffy!...
www.123people.com/s/janice+duffy - United States

- 77 The Judge found that Google published the ‘123 People’ paragraphs to a substantial number of persons who searched ‘Dr Janice Duffy’ between January and December 2010. Paragraphs linked to another ‘123 People’ webpage appeared only intermittently and when the results appeared they were generally only found on pages after the first page of the search results. For that reason, the Judge was not satisfied that a substantial number of persons who conducted searches on the Google Australia website using either of the search terms read the paragraphs relating to the other ‘123 People’ webpage.

- 78 It is not obvious to me why the Judge limited the finding of publication to the calendar year 2010 notwithstanding his findings that Google could, acting

¹⁵ *Duffy v Google Inc* (2015) 125 SASR 437 at [328], [364]-[365].

¹⁶ The finding may be a typographical error which was intended to read October 2010 but is of no significance because of the low order in the search results of that paragraph.

¹⁷ *Duffy v Google Inc* (2015) 125 SASR 437 at [334].

reasonably, have blocked the offending users by October 2009 and that they were not, in fact, blocked until March 2011. However the more limited period of publication appears to reflect the period during which a finding of publication of the particular contents of the searches could confidently be made based on printouts of the searches conducted by Dr Duffy in that calendar year. For that reason I would dismiss Dr Duffy's grounds of appeal which complain that the findings as to the specific period of publication were unduly restricted.

79 The Judge was satisfied that a substantial number of persons in Australia who conducted searches on the Google Australia website for 'Janice Duffy' between August 2011 and June 2013 read the words 'janice duffy psychic stalker' generated by Google's Autocomplete function. The Judge based that finding on Ms Palumbo's evidence and on the AdWords searches which showed that in March 2012, September 2012, and June 2013 an average of 91, 46, and 110 monthly searches respectively were made for 'Janice Duffy psychic stalker' over the preceding 12 months. The Judge found that it was likely that many of those searches were the result of the Autocomplete function. This was because when the words were generated by Google's Autocomplete function, those searchers were very likely to have noticed the generation of the words in order to make the search. However the Judge found that no defamatory imputation was conveyed by the words so generated because the person undertaking the searches would have understood that the autocomplete function simply reproduced commonly made searches. I observe here that the acceptance of the autocomplete suggested term is some evidence that any searcher's interest may have been the controversy between Dr Duffy and the psychics.

The defamatory imputations

80 The Judge concluded that the following paragraphs, which his Honour identified by reference to letters for the purpose of further considering the imputations found in them,¹⁸ were published to a substantial number of persons between January and December 2010 and were defamatory. I have included beneath each paragraph the imputations which the Judge found they contained.

First and Second Ripoff Report webpages (results obtained by searching for 'Dr Janice Duffy'):

- A Janice Duffy – Psychic Stalker Psychics Beware Of...
 Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher ...
www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached
1. Dr Duffy stalks clairvoyants and others who have a claim to have paranormal powers (psychics)
 2. Dr Duffy is an embarrassment to her profession

¹⁸ *Duffy v Google Inc* (2015) 125 SASR 437 at [346]-[351].

B, D Rip-off Report Dr Janice Duffy ...

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!!
Adelaide, South Australia Adelaide, South Australia
www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm Cached

1. Dr Duffy stalks psychics

First and Second Ripoff Report webpages (results obtained by searching for 'Janice Duffy'):**C Janice Duffy – Psychic Stalker Psychics Beware Of...**

Psychics beware of psychic stalker Janice Duffy...
www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached

1. Dr Duffy stalks psychics

E Janice Duffy – Email Address, Phone Numbers, Everything!

Dr Janice Duffy Stop the Australian Psychic Stalker Dr Janice Duffy!...
www.123people.com/s/janice+duffy - United States

1. Dr Duffy stalks psychics

81 The Judge also found that Google published the underlying webpages linked to paragraphs A and B to a substantial number of persons between January and December 2010 being the webpages at the following URLs:

H First Ripoff Report web page:

www.ripoffreport.com/psychics/janice-duffy-psychic/janice-duffy-psychic-stalker-98d93.htm
(the first Ripoff Report webpage);

I Second Ripoff Report web page:

<http://www.ripoffreport.com/psychic/dr-janice-duffy/dr-janice-duffy-stop-the-aust-stalker-deb8p.htm> (the second Ripoff Report webpage).

82 The first Ripoff Report included the following relevant text, the comments on that text are the numbered paragraphs:

Report: Janice Duffy – Psychic Stalker! Psychics Beware of Australian Psychic Stalker!

Reported by: (Riverton Wyoming)

Janice Duffy – Psychic Stalker! Psychics Beware of Australian Psychic Stalker!
Janice Duffy Stalked me on the computer for several months. She uses the name Janice and other phoney names and keeps on sending you her name over and over again. I know of her because she stalked me on the psychic website Kasamba and other websites. I am sad to say that she has stalked other psychics as well. Australia Adelaide internet.

...

Psychics must beware of a psychic stalker named Janice Duffy. ... She threatens psychics to abide by her rules or else she will blackmail them by writing rip off reports about them. ... She ... harasses psychics over and over again. She will not stop and has a stalker like mentality. She spreads malicious [sic] lies and gossip about people in hopes to gain sympathy for her life. She cannot even work right now and has been laid off by the hospital in which she works because she cannot even function on a day to day life. ... She is also someone who spreads lies and says that she is another person from Australia ... She also makes up lies about people dying and committing suicide. ... She ... stalks psychics for more information and if she doesn't get any, she writes fake and phoney information about them on-line. ... Nobody likes to be stalked and Janice Duffy will not stop until the psychic community becomes aware of who Janice Duffy is and the fact that she has a serious stalking problem. ...

...She is a PHD and should not be using her power to try to harass and talk psychics. She works for a hospital and it's a shame that she knows the rules of the psychic websites and yet stalks psychics continuously on them. Psychics, please beware of this woman. You have been warned. If you wish to file a harassment lawsuit against her for stalking, please write to me and I will give you her real mailing address so that you can call her local police station and have her stopped for stalking. She harasses continuously. ...

Mary anne
Riverton, Wyoming
USA

This report was posted on 'Ripoff Report on 12/30/2007 4:00:21 PM and is a permanent record located here: <http://www.ripoffreport.com/psychic/janice-duffy-psyhic/janice-duffy-psyhic-stalker-98d93.htm>. Ripoff Report has an exclusive license to this report. It may not be copied without the written permission of Ripoff Report.

#1 Story sounds similar to my friend's experience with Janice
Katie – Smalltown (USA)

... Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher in Adelaide, Australia.

...

#3 Dr. Janice Duffy uses her government work email address to email anti Kasamba psychic clients.
Katie –Smalltown (USA)

...I can't believe she used her government email for personal purposes and it proves how stupid she is. This will be reported to her superior for breaking the law. ...

...

83 The Judge found that the first Ripoff Report made the following defamatory imputations:¹⁹

1. Dr Duffy stalks psychics;²⁰

¹⁹ *Duffy v Google Inc* (2015) 125 SASR 437 at [368].

2. Dr Duffy harasses psychics by persistently and obsessively pursuing them;²¹
3. Dr Duffy misused her government work email address by sending emails for non-work or other wrongful purposes;²²
4. Dr Duffy spreads malicious lies and gossip about other people with a view to gaining sympathy for herself;²³
5. Dr Duffy spreads lies about people dying;²⁴
6. Dr Duffy spreads lies about people committing suicide;²⁵
7. Dr Duffy is an embarrassment to her profession;²⁶
8. Dr Duffy is unable to function in day-to-day life;²⁷
9. Dr Duffy has been laid off by the hospital where she works because she cannot function in day-to-day life.²⁸

84 The relevant parts of the second Ripoff Report read:

Report: Dr Janice Duffy

Reported by: (Riverton Wyoming)

Dr. Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide, South Australia Adelaide, South Australia

...

Dr Janice Duffy P.H.D has been stalking psychics for a long time now and she must be stopped. Her harassing emails have caused many psychics to go into hiding because of her blackmailing and forcing psychics to respond to her emails. She is from Adelaide, South Australia and has made numerous rip off reports and has lied about many psychics on-line. ... If you don't do what she says, then she is known to use blackmail and says that she will write rip off reports about you... Dr. Janice Duffy has tried to blackmail numerous psychics begging them for free updates and email updates and if you don't respond to her, she starts creating rip off reports with many lies to try to gain sympathy from people who will respond to

²⁰ 'Janice Duffy – Psychic Stalker...she stalked me on the psychic website Kasamba and other websites. I am sad to say that she has stalked other psychics as well...she has a serious stalking problem...stalks psychics continuously...please write to me and I will give you her real mailing address and you can call her local police station and have her stopped from stalking...In most countries stalking is against the law'.

²¹ 'harasses psychics over and over again. She will not stop ... has harassed psychics on an ongoing basis ... She harasses continuously'.

²² 'I can't believe she used her government email for personal purposes and it proves stupid she is. This will be reported to her superiors for breaking the law.'

²³ 'she spreads malicious lies and gossip about people and hopes to gain sympathy for her life.'

²⁴ 'she also makes up lies about people dying and committing suicide.'

²⁵ 'she also makes up lies about people dying and committing suicide.'

²⁶ 'truly an embarrassment to her profession'.

²⁷ 'she cannot even function on a day-to-day life'

²⁸ 'she ... has been laid off by the hospital in which she works because she cannot even function on a day to day life'

her posts. ... she has also written fake and deceptive rip off reports about psychic websites. ...After the first few psychic readings, she tends to write emails to psychics for updates and when she doesn't hear back from you fast enough, she begins to send you hate mail which usually says that she is going to ruin your name and reputation on-line as a psychic. ...

Mary anne
Riverton Wyoming
U.S.A

This report was posted on Ripoff Report on 12/31/2007 1:54:36 PM and is a permanent record located here: <http://www.ripoffreport.com/psychic/dr-janice-duffy/dr-janice-duffy-stop-the-aust-stalker-deb8p.htm>. Ripoff Report has an exclusive license to this report. It may not be copied without the written permission of Ripoff Report.

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#2 Australian Dr. Janice Duffy senior researcher stalks Kasamba psychic advisors and uses her Dr. title to allow people to believe that she is being ripp

Mary Anne – Riverton (U.S.A.)

Australian Dr. Janice Duffy senior researcher stalks Kasamba psychic advisors and uses her Dr. title to allow people to believe that she is being ripped off by psychics. She is responsible for most of the false rip off reports created about Kasamba ... Stop stalking psychics doctor Janice Duffy ...

Dr. Janice Duffy is responsible for the numerous fake rip off reports about psychics ... she wants to stalk psychics until she gets her way. ... She is a very sick woman and wants to stalk and destroy Kasamba and their psychics... She won't stop until she is locked up or sued. ... She ...manipulates and threatens people to give her what she wants. ...

As you can see, she is very equipped to stalk psychics and does this on a regular basis. ... She makes up lies and spends her free time stalking ... her obsession cannot end. Stalking is a mental illness and unless she gets treatment, she cannot stop herself. ...

... She is using blackmail and is currently writing and telling others what she is going to be doing. Your name may or may not be on her list. ... Dr. Janice Duffy ... will make it her priority to stalk you. Stalking is a serious illness and she cannot stop until she is medicated or put in jail. ... She ... stalks daily. ... She has been stalking for a long time now ... Please also note that many people in her anti psychic groups feel that she has email hacking software or knows and uses hackers. It is rumoured in some of her anti psychic groups that she tries to get your personal email address and then tries to hack into it. ... What is even more bizarre is that Dr. Janice Duffy has used her government email address to email anti Kasamba clients. This can be tracked by the governments webmaster. We will be forwarding this report to her superiors as a way to gain court evidence that she did indeed write and receive emails from her anti psychic kasamba group members with her government email address; therefore breaking government rules. You cannot use a company's email address for personal purposes. ...

...

85 The Judge found that the second Ripoff Report made the following defamatory imputations:²⁹

1. Dr Duffy stalks psychics;³⁰
2. Dr Duffy harasses psychics by persistently and obsessively pursuing them;³¹
3. Dr Duffy misused her government work email address by sending emails for non-work or other wrongful purposes;³²
4. Dr Duffy without their permission, fraudulently and/or maliciously accesses other peoples emails, stored electronic materials and/or electronic memberships;³³
5. Dr Duffy made unfair, inaccurate and damaging reports about psychics;³⁴
6. Dr Duffy has disseminated lies about psychics;³⁵
7. Dr Duffy spreads malicious lies and gossip about other people with a view to gaining sympathy for herself;³⁶
8. Dr Duffy spreads lies about people dying;³⁷
9. Dr Duffy has engaged in criminal conduct;³⁸
10. Dr Duffy threatens and manipulates people to further her own ends.³⁹

²⁹ *Duffy v Google Inc* (2015) 125 SASR 437 at [371].

³⁰ 'Dr Janice Duffy PHD has been stalking psychics for a long time now and she must be stopped...now this stalker is being exposed to stop her... she is very equipped to stalker psychics and does this on a regular basis ... stalking is a mental illness and unless she gets treatment, she cannot stop herself ... stalking is a serious illness and she cannot stop until she is medicated or put in jail ... She is from Australia and stalks daily ... She has been stalking for a long time ago now.'

³¹ 'Her harassing emails have caused many psychics to go into hiding... She likes to go to psychic websites and harass psychics ... She has a crazy obsession with psychics and simply won't stop harassing them'.

³² 'What is even more bizarre is that Dr. Janice Duffy has used her government email address to email anti Kasamba clients. This can be tracked by the governments webmaster. We will be forwarding this report to her superiors as a way to gain court evidence that she did indeed write and received emails from her anti psychic kasamba group members with her government email address; therefore breaking government rules. You cannot use a company's email address for personal purposes'.

³³ 'Please also note that many people in her anti-psychic groups feel that she has email hacking software or knows and uses hackers. It is rumoured in some of her anti-psychic groups that she tries to get your personal email address and then tries to hack into it.'

³⁴ 'she starts creating Ripoff reports with many lies... She has also written fake and deceptive rip-off reports about psychic websites ...She is responsible for most of the false rip-off reports created about Kasamba ...'.

³⁵ 'she... has lied about many psychics on-line... she starts creating rip-off reports with many lies ... still making false claims against the psychics ... She makes up lies ... '

³⁶ 'she starts creating a rip-off reports with many lies to try to gain sympathy from people who will respond to her posts'.

³⁷ 'she is making up stories about death'.

³⁸ 'Janice is committing a crime.'

³⁹ 'she is a doctor and knows how to manipulate innocent people... She knows how to manipulate ...She manipulates and threatens people to give her what she wants. '

86 It is important to note here that the author of the Ripoff Reports, who was in effect replying to Dr Duffy's posting, refers to her PhD qualifications and alleges that Dr Duffy was inappropriately using her academic title to add weight to her criticisms of the psychics.

Elements of publication

87 The trial Judge usefully identified that the tort of defamation has the following elements:⁴⁰

1. the defendant participates in publication to a third party of a body of work;
2. the body of work contains a passage alleged to be defamatory;
3. the passage conveys an imputation;
4. the imputation is about the plaintiff;
5. the imputation is damaging to the plaintiff's reputation.

(citations omitted)

88 Publication is a multilateral act which occurs when words and or images created and disseminated by one or more persons are comprehended by another or others.⁴¹ It is for that reason that the focus on *participation* in the first of the Judge's elements is both useful and important. Publication of the printed word has always been a process rather than a single act. The process can be complex and involve many actors. As shall be seen the nature of one's participation may critically affect the participant's ultimate liability.

89 The participants in the publication may play primary or secondary roles. Authors and editors are primary participants. The principal of an enterprise which creates or procures and then disseminates words or images is a primary participant in the process of publication and is commonly referred to as the publisher. Historically printers have also been regarded as primary publishers but that rule has been doubted in modern times. Both publishers and printers are generally liable as primary participants even though they print and publish the work through their servants and agents.⁴²

90 In question in *Webb v Bloch*⁴³ was the responsibility of the whole committee of an association for the publication of a defamatory circular published at the instigation of one of its members. The other members of the committee confirmed the member's instructions to a solicitor to publish what was ultimately found to be the defamatory libel. Isaacs J in that case discussed the meaning of

⁴⁰ *Duffy v Google Inc* (2015) 125 SASR 437 at [158].

⁴¹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 600, [26] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

⁴² *Emmens v Pottle* (1885) 16 QBD 354 at 357 – 358 per Lord Escher MR.

⁴³ (1928) 41 CLR 331.

publication by reference to both the civil law concepts of agency and the criminal law concepts of accessorial liability:⁴⁴

The meaning of ‘publication’ is well described in *Folkard on Slander and Libel*, 5th ed. (1891), at p. 439, in these words: ‘The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrumental to such publication; since, *if he has intentionally lent his assistance to its existence for the purpose of being published*, his instrumentality is evidence to show a publication by him.’ In *Starkie on the Law of Slander and Libel*, 1st ed. (1830), vol. II., at p. 29, it is said: ‘The declaration generally avers, that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary either in a civil or criminal proceeding; in civil proceedings, *the principal is to all purposes identified with the agent* employed by him to do any specific act’ &c. In *Parkes v Prescott Giffard* Q.C. quotes from the second edition of *Starkie*: ‘All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as *principals in the act of publication*: thus if one *suggest* illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.’ In *R v Paine* it is held: ‘If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; *for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty*: so that murdering a man’s reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.’ A little later in *R v Drake*, that law was reaffirmed. In *The Queen v Cooper* Lord Denman CJ said: ‘If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: *he contributes to a misdemeanour and is therefore responsible as a principal*.’ ... In relation to *Webb*, it is Norman who was the ‘real author,’ the master mind, and the defendants, for their own independent objects, no doubt, were the real ‘intermediate agents’ to disseminate the libel. They cannot employ the master mind for the very purpose, accept its suggestions, approve and disseminate its production, and then disclaim its malice. *S Pearson & Son Ltd v Dublin Corporation* is rightly considered by text-writers (as *Fraser on Libel and Slander*, 6th ed., at p. 269; *Gatley on Libel and Slander*, at p. 409; *Spencer Bower on Actionable Defamation*, 2nd ed., at p. 265) an authority for the position that principal and agent *inter se* are principals in relation to the person defamed. It answers the contention of the respondent that, however this might be the case had the defendants not reserved to themselves the final right of approval, the reservation and exercise of that right made a difference. In the case cited Lord Loreburn LC said: ‘*The principal and the agent are one*, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.’

(emphasis in original; citations omitted)

91 In the broader sense, any facilitation of publication might be said to be participation in it. However, there must be closer limits on the scope of liability as a secondary participant. To draw an analogy with accessorial liability in crime, it is notable that some participation may result in liability as an accessory before the fact but not as a principal in either the first or second degree. So too in

⁴⁴ *Webb v Bloch* (1928) 41 CLR 331 at 363 – 365.

the tort of defamation not all facilitation will result in liability, even as a secondary participant, in the publication. Much depends on the degree of causal connection between the facilitating act and the publication of the material.

92 Participation in the publication of defamatory matter in any degree must be deliberate, or at least negligent, but intention as to the very act of publication will not often be an issue.⁴⁵

93 The defamatory statement may be the only material published or it may be a small part of it, buried in volumes of other material. Even though the pleadings in civil and criminal libels historically expressly pleaded malicious publication, it was only malice in law which was necessary. Malice in law was an intentional (or reckless) act in the absence of circumstances of justification or excuse. Malice was presumed.⁴⁶ The presumption in libel, like the presumption applied in the criminal law in the 19th century, was that a person intends the consequences of his deliberate act.⁴⁷ It was only necessary to prove express malice, or malice in fact, to rebut a defence like that of qualified privilege. A primary participant in a publication was therefore presumed to know all that it contains but, as will be seen, that presumption was not applied to an ‘innocent’ secondary participant in the publication.

94 An intermediary who receives material containing defamatory words for the purpose of distributing it to others either as an agent of the publisher, or as a retailer of material purchased from a publisher, is generally a secondary participant.

95 In 1885, in *Emmens v Pottle*,⁴⁸ (*Emmens*) the English Court of Appeal held that the defendant who carried on business as a newspaper vendor was a secondary participant and therefore was only liable in tort if he or she knew, or ought to have known, that the newspapers included the defamatory words.

96 In *Emmens*, Lord Escher MR was much influenced by matters of legal policy, describing it as ‘wholly unreasonable and unjust’ to hold a newspaper vendor liable.⁴⁹ Bowen LJ emphasized that generally a newspaper is not inherently dangerous and its distributors are therefore not bound to know its contents, but was careful to distinguish newspapers which commonly carry libellous material.⁵⁰

⁴⁵ The accidental sending of an email may raise a difficult question in that regard.

⁴⁶ Folkhard, H, *Starkie’s Treatise on the Law of Slander and Libel*, 3rd Ed, Butterworths 1869 at pp 300-301.

⁴⁷ Cooke, G, *A Treatise of the Law of Defamation*, 1st Ed, Owen Richards, London, 1844 at pp 28-30; Flood, J, *A Treatise on the Law Concerning Libel and Slander*, 1st Ed, Maxwell, Sydney, 1880 at pp 36-37.

⁴⁸ (1885) 16 QBD 354.

⁴⁹ (1885) 16 QBD 354 at 357 per Lord Escher MR.

⁵⁰ (1885) 16 QBD 354 at 358 per Bowen LJ.

- 97 In *Vizetelly v Mudie's Select Library Limited*,⁵¹ (*Vizetelly*) the same rule was applied to the dissemination of books through a circulating library. In *Vizetelly* Vaughan Williams LJ explained that the very basis of a libel action was the false and malicious publication of a defamatory matter and that malice was generally presumed from the act of publication.⁵² The presumption could be rebutted only in limited circumstances.⁵³ As I have observed, malice has a special meaning as the mental element which precludes reliance on certain defences like qualified privilege. In this context, however, it refers to the purported publisher's knowledge of the presence of the words which are found to carry defamatory imputation.
- 98 Google contended at trial and on appeal that the innocent dissemination doctrine required Dr Duffy to prove that Google knew or ought to have known that the relevant passages were actionable or otherwise unlawful as defamation. Google contended that the defence of innocent dissemination excused it from liability unless it knew or ought to have known that the defamatory passages were false.⁵⁴ The Judge correctly rejected that submission. Knowledge that the words carry the imputation, let alone knowledge that they cannot be justified, need not be proved by the plaintiff or rebutted by the defendant. That would impose an impossible burden on the plaintiff and swing the pendulum radically in favour of freedom of expression and against the interest of the individual in protecting his or her reputation. Ignorance of the law is generally not an excuse or justification in any field of the law. The ignorant should not be allowed to wreck reputations with impunity. Once knowledge, actual or constructive, of the presence of the words is proved, the secondary publisher who persists in dissemination of the material carries the risk of the ultimate findings as to their meaning and absence of justification which may be made in any action brought by a primary publisher. The contrary position taken by Lord Denning in *Goldsmith v Sperrings Ltd*⁵⁵ has not been accepted.
- 99 *Emmens* and *Vizetelly* treated secondary participants as innocent disseminators to whom the presumption of malice, in the sense of knowledge, did not apply. On one view of those decisions the absence of malice negated the element of publication. However, the fundamental distinction on the element of malice, in the sense of knowledge of the presence of the defamatory words in the publication, drawn by the Court of Appeal in those cases was between the primary publisher to whom knowledge was conclusively attributed and a secondary, 'innocent' disseminator who could rebut the presumption of malice by evidence.

⁵¹ [1900] 2 QB 170.

⁵² *Vizetelly v Mudie's Select Library Limited* [1900] 2 QB 170 at 178.

⁵³ *Vizetelly v Mudie's Select Library Limited* [1900] 2 QB 170 at 177-178.

⁵⁴ *Duffy v Google* (2015) 125 SASR 437 at [257].

⁵⁵ [1977] 1 WLR 478 at 487.

100 The better approach, consistent with the modern dichotomy between acts and accompanying states of mind, is to recognise that knowledge of the presence of the defamatory material is an element of the tort, albeit one which is conclusively presumed against primary participants. The presumption can be rebutted by a secondary participant who shows that he or she did not know and could not reasonably have known that the material disseminated contained the impugned words.⁵⁶

101 Google's submission that the decisions in *Emmens* and *Vizetelly* were erroneous developments of the common law and that primary and secondary participants are not publishers at all unless proven to have had knowledge of the impugned statement and that it was defamatory must be rejected. The rule is now too well established to be overruled.⁵⁷

102 I would therefore reframe the first two elements identified by the Judge as follows:

- 1 the defendant participates in the publication to a third party of a body of work containing the defamatory material;
- 2 the defendant does so knowing that the work contains the defamatory material. That knowledge is presumed conclusively in the case of a primary participant, but may be rebutted by a secondary participant who does not know and could not reasonably have known of the presence of the material.

103 Irrespective of whether lack of knowledge is expressed as a standalone defence or an element of the liability of a secondary participant, the defendant carries the onus of establishing that it did not know, or could not reasonably have known, that the publication contained the defamatory statement. It is more consistent with the historic irrebuttable presumption of malice to hold a secondary participant liable for all of the contents of the publication, without requiring the plaintiff to prove that the defendant knew, or ought to have known, that the work contained the defamatory words or symbols. However, the defence of innocent dissemination may be established by showing both that participation in the publication is secondary and that the participant's ignorance of the defamatory material was not negligent.

104 The responsibility of printers as primary publishers has been questioned because of their changing role in the process of publication. Technology has perhaps left printers in an anomalous position. Modern printers may now print from an electronic file without reading its contents. Older printing technology

⁵⁶ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586 per Brennan CJ, Dawson and Toohey JJ, citing Neill B and Rampton R, *Duncan and Neill on Defamation*, 2nd Ed, Butterworths, 1983 at p 110 fn 3.

⁵⁷ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586 per Brennan CJ, Dawson and Toohey JJ, at 592 per Gaudron J. See also *Lee v Wilson* (1934) 51 CLR 276.

involved the use of linotype machines which produced lines of solid type printing which necessitated the reading of the material. In modern times printers are not so much a publisher of the material but a provider of services to the publisher.

105 The common law's classification of printers as primary publishers perhaps reflected that technology which meant that printers would always be in a position to know that defamatory material was included in what they printed. The strictness of the rule against printers may also have been a check and balance against the freedom of the [printing] press recognised by the common law when it rejected the need for prior approval by the Crown [imprimatur] of publication.⁵⁸ It should also be noted that there was an ancillary common law rule that a printer was not bound by his or her contract to print any part of a work which was defamatory and could sue on quantum meruit for work done in printing the balance.⁵⁹

106 In *McPhersons Ltd v Hickie*⁶⁰ the New South Wales Court of Appeal thought that it was arguable in principle that modern day printers should be treated as secondary participants.

107 In *Thompson v Australian Capital Television Pty Ltd*⁶¹ (*Thompson*) the High Court considered the distinction between primary and secondary publishers in the context of television broadcasting. The defendant (Channel 7) was a television broadcaster in the Australian Capital Territory and broadcast, live, a current affairs program called 'The Today Show' which was produced by another entity, Channel Nine Pty Ltd (Channel 9). In the course of a live interview the plaintiff's stepdaughter made defamatory remarks about him. The program was broadcast live by Channel 9 in Sydney and sent by a microwave link to Channel 7 which chose to broadcast it nearly instantaneously into the Australian Capital Territory.

108 Brennan CJ, Dawson and Toohey JJ accepted that there is no reason in principle to deny a mere disseminator of electronic material the defence of innocent dissemination if the circumstances so permit.⁶² However they held that Channel 7 was not a mere disseminator because it had the ability to control and supervise the material it televised. The plurality accepted that Channel 7 had no ability to monitor the content between its receipt at its tower in the Australian Capital Territory and its telecast but rejected the proposition that it was merely a conduit because Channel 7 had made the prior decision that the telecast should be near instantaneous. The plurality held therefore that Channel 7 was not a secondary publisher or innocent disseminator. The plurality expressly had regard

⁵⁸ Eames and Odgers, *A Digest on the Law of Libel and Slander and of Actions on the Case for Words Causing Damage*, 5th ed, Stevens, 1911 at pp 10-13.

⁵⁹ Eames and Odgers, *A Digest on the Law of Libel and Slander and of Actions on the Case for Words Causing Damage*, 5th ed, Stevens, 1911 at p 8.

⁶⁰ [1995] Aust Torts Reports 81-348.

⁶¹ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

⁶² *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589.

to the high risk of extensive publication by instantaneous rebroadcasting and the nature of Channel 7's business decision.

109 The plurality also held that, in any event, Channel 7 had failed to take any precautions against the rebroadcasting of defamatory material and that the innocent dissemination defence would therefore have failed.

110 There is a significant distinction between re-broadcasting television content and distributing hard copy newspapers. The disruption to both the business model of newspaper distribution, and to the public's interest in the dissemination of news would be crippling if the distributor were required to 'legal' all content in a newspaper produced by the newspaper proprietor and either, with the consent of the publisher, redact the defamatory material before distribution of the paper, or refuse to distribute it at all. However the re-broadcaster of electronic material can momentarily delay the broadcast, and/or delete parts of the audio-visual material quickly and cost-effectively without requiring the co-operation of the primary broadcaster. Moreover, as a matter of proper description, a television station which selects and purchases content and then makes it available as part of its continuous or regular broadcasts is a publisher and not a disseminator. A publisher is more naturally understood, as was submitted by Channel 7 in that case, as a person who produces, selects and composes the contents of the publication or has the ability to limit, control and supervise the material which will be published.

111 Gaudron J accepted that, in principle, the rules of innocent dissemination by a secondary participant can apply to the retransmission of televised material.⁶³ Gaudron J restated the innocent dissemination doctrine in the following way:⁶⁴

In my view, it ought now be accepted that one who publishes by authorising a communication is not a subordinate distributor. Conversely, in my view, it ought also be accepted that one who does not authorise the communication but participates in it in some other way is a subordinate distributor and entitled to rely on the defence of innocent dissemination. To put the matter that way is simply to put a person who only participates in a mass communication on an equal footing with one who communicates defamatory matter to an individual. As already indicated, a person who communicates defamatory matter to another is liable only if the communication is intentional or negligent.

112 Gaudron J held that in the circumstances of that case Channel 7 authorised the retransmission and was therefore a publisher and not entitled to rely on the defence of innocent dissemination

113 With respect, the difficulty with the restatement essayed by Gaudron J is that it leaves the meaning of the word 'authorise' largely unexplained. Nonetheless, by reference to the reasoning of the plurality and Gaudron J, it appears that a person is a primary participant in a publication, and authorises it, if

⁶³ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 594.

⁶⁴ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 595-596.

he or she has the ultimate legal and practical capacity to produce, reproduce or edit the contents of a publication, or to prevent it being received by another.

114 The secondary participation rule and the decision in *Lee v Wilson*⁶⁵ was endorsed by the High Court in *Dow Jones & Co Inc v Gutnick*.⁶⁶

[25] The tort of defamation, at least as understood in Australia, focuses upon publications causing damage to reputation. It is a tort of strict liability, in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care. Yet a publication made in the ordinary course of a business such as that of bookseller or news vendor, which the defendant shows to have been made in circumstances where the defendant did not know or suspect and, using reasonable diligence, would not have known or suspected was defamatory, will be held not to amount to publication of a libel.

(citations omitted)

Innocent dissemination – the statutory defence

115 Section 30 of the *Defamation Act 2005* (SA) provides:

30—Defence of innocent dissemination

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (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.
- (2) For the purposes of subsection (1), a person is a *subordinate distributor* of defamatory matter if the person—
 - (a) was not the first or primary distributor of the matter; and
 - (b) was not the author or originator of the matter; and
 - (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.
- (3) Without limiting subsection (2)(a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of—

⁶⁵ (1934) 51 CLR 276.

⁶⁶ (2002) 210 CLR 575 at 600, [25] per Gleeson CJ, McHugh, Gumow and Hayne JJ.

- (a) a bookseller, newsagent or news-vendor; or
- (b) a librarian; or
- (c) a wholesaler or retailer of the matter; or
- (d) a provider of postal or similar services by means of which the matter is published; or
- (e) a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter; or
- (f) a provider of services consisting of—
 - (i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded; or
 - (ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form; or
- (g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control; or
- (h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.

116 Despite the enactment of s 30 both Dr Duffy and Google submit that the common law of innocent dissemination remains unchanged. Both Dr Duffy and Google rely on s 6 of the *Defamation Act 2005* (SA) which preserves the common law.

6—Tort of defamation

- (1) This Act relates to the tort of defamation at general law.
- (2) This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).
- (3) Without limiting subsection (2), the general law as it is from time to time applies for the purposes of this Act as if the provisions of Part 2 of the *Civil Liability Act 1936* had never been enacted.

117 In *Setka v Abbott*⁶⁷ it was held that the equivalent provision in the Victorian Act should not be narrowly confined.

⁶⁷ (2014) 44 VR 352 at 381, [116] per Warren CJ and Ashley JA.

118 Moreover s 22(1) of the South Australian Defamation Act provides that a statutory defence is additional to any other defence or exclusion of liability.

22—Scope of defences under general law and other law not limited

- (1) A defence under this Division is additional to any other defence or exclusion of liability available to the defendant apart from this Act (including under the general law) and does not of itself vitiate, limit or abrogate any other defence or exclusion of liability.
- (2) If a defence under this Division to the publication of defamatory matter may be defeated by proof that the publication was actuated by malice, the general law applies in defamation proceedings in which the defence is raised to determine whether a particular publication of matter was actuated by malice.

119 The Second Reading Speech in the Legislative Council on the introduction of the *Defamation Bill 2005 (SA)* expressly stated that ‘the common law defence of qualified privilege [continues] to operate’.⁶⁸ However the following statement was made in the general introduction to the Bill:⁶⁹

The Bill will not entirely displace the common law rules. Rather, it will modify and supplement it in a way that is appropriate to modern means of communication, and in a way that has been agreed by all the State and Territory Attorneys General and drafted in consultation with Parliamentary Councils Committee.

120 In the Second Reading Speech in the House of Assembly, the proposed s 30 was explained in the following way:⁷⁰

30—Defence of innocent dissemination

Proposed section 30 provides that it is a defence to the publication of defamatory matter if the defendant proves that—

- the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor; and
- the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and
- the defendant’s lack of knowledge was not due to any negligence on the part of the defendant.

A person will be a subordinate distributor of matter for the purposes of the proposed section if the person—

- was not the first or primary distributor of the matter; and

⁶⁸ South Australia, *Parliamentary Debates*, Legislative Council, 14 September 2005, 2538, (Paul Holloway, Minister for Industry and Trade).

⁶⁹ South Australia, *Parliamentary Debates*, Legislative Council, 14 September 2005, 2537, (Paul Holloway, Minister for Industry and Trade).

⁷⁰ South Australia, *Parliamentary Debates*, House of Assembly, 2 March 2005, 1839 (Michael Atkinson, Attorney-General).

- was not the author or originator of the matter; and
- did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.

The proposed section also lists a number of circumstances in which a person will generally not be treated as being the first or primary publisher of matter. The defence largely follows the defence of innocent dissemination at general law. See, for example, *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

However, the provision seeks to make the position of providers of Internet and other electronic and communication services clearer than it is at general law. For example, the provider of an Internet email service will generally not be treated as being the first or primary distributor of defamatory matter contained in an email sent using the service. Accordingly, a service provider of that kind will be treated as being a subordinate distributor for the purposes of the defence unless it can be shown that the service provider was the author or originator of the matter or had the capacity to exercise editorial control over the matter.

(emphasis added)

121 The above excerpt perhaps demonstrates that the defence of innocent dissemination was, at that time, seen as a catchall defence for internet service providers. However, the second reading speech does not consider in any real detail the challenges which the internet presents to the law of defamation. Indeed, whilst the Bill asserts that it has been updated for modern times, the Second Reading Speech refers to the ‘internet’ four times, once in defining the word *matter*, once to suggest internet service providers urged Australian governments to unify defamation law, and twice in the italicised passage above. Further debates in the House of Assembly did not refer to the ‘internet’, and only referred to ‘email’ once.⁷¹

122 There was some debate in the Legislative Council as to the defence of qualified privileged however that debate examined a purported chilling effect on free speech.⁷² The Bill was ultimately passed without further amendment by the Council.

123 Returning to the statutory defence itself, the Judge found that Google was a subordinate distributor but that Google knew or ought to have known that it was probably a defamatory matter.⁷³ Those findings are not challenged because Google relied on the common-law defence. Whether or not Google is the primary distributor or author of the paragraphs even though they are selected from earlier published material presents a question of some nicety. So too does the question of control.

⁷¹ South Australia, *Parliamentary Debates*, House of Assembly, 13 September 2005, 3316 (Vickie Chapman).

⁷² South Australia, *Parliamentary Debates*, Legislative Council, 20 October 2005, 2824-2825 (Robert Lawson).

⁷³ *Duffy v Google Inc* (2015) 125 SASR 437 at [384]-[387].

The trespass cases

124 Because the internet allows one person to add to, or change, a webpage created and maintained by another in the cases involving publication on the World Wide Web, there is some reliance on an analogy with what are described as the 'trespass' cases in which hardcopy defamatory material is affixed to a building or structure maintained by another. The analogy is far from perfect even when considering the liability of a person who manages or maintains a webpage on to which others post content. It is even more strained when applied to hosts of internet servers and internet search engines. Indeed, the trespass cases do not have any obvious application to the circumstances of this case. The Google search engine was not the subject of unwanted parasitic attacks by other webpage hosts, nor by commentators attaching malicious content to Google's own. The search engine is purposefully designed to trawl the World Wide Web for webpages relating to the user's search terms so that it can display extracts of them for the reader. The fish caught in the fisherman's net which are then offered to others for consumption are hardly trespassers. So too for Google's paragraphs or snippets. Nonetheless the need to ensure coherence in the approach to internet communications requires some consideration of the analogy.

125 In *Byrne v Deane*,⁷⁴ (*Byrne*) Mr and Mrs Deane, the managers of a golf club, were found liable for a defamatory notice on a notice board maintained within the club. The club rules prohibited the posting of any notice in the premises without the consent of Mrs Deane who was the secretary of the club. After becoming aware of the notice, Mr and Mrs Deane took no steps to remove it.

126 Greer LJ (with whom Greene LJ relevantly agreed) held that the Deanes had published the notice by allowing it to rest on the wall from the time they became aware that it was there. Greene LJ held that the evidence showed that the Deanes made a deliberate election to leave the notice there, and that they had thereby accepted responsibility for its continued presence.

127 In effect, the Deanes were treated as secondary participants; it was only when the presence of the notice was brought to their attention that they became liable. Identification of the precise foundation of the decision in *Byrne* is problematic because the Deane's liability is founded on an omission. Determination of responsibility for not pulling down a defamatory notice, and the time which should be allowed to allow the notice to be removed, requires resolution of the conflicting rights and interests of two innocent parties. The ultimate issue is when one person must commit his time and resources to act in order to save another's reputation from publication by a third person in which he or she played no part.

⁷⁴ [1937] 1 KB 818.

128 However, the case against the Deanes was a relatively strong one because on one view when the Deanes became aware of the notice, and aware that the notice was clearly visible to members using the clubrooms, they became primary publishers by continuing to allow people into the room in which the defamatory statement was displayed. There is some analogy between their act in permitting access to the defamatory notice and the defendant found liable for pointing to a defamatory placard.⁷⁵

129 In *Urbanchich v Drummoyne Municipal Council*⁷⁶ (*Urbanchich*) Hunt J held that there was a case which ought to proceed to a jury in an action in defamation brought against the Council because it allowed defamatory posters to remain on its bus shelters. The difficulty posed by the facts of *Urbanchich* is that the imposition of an obligation, on a local government authority, to remove defamatory material may be unreasonably onerous. The removal of a poster may be very expensive. An authority in the position of a Council may wish to schedule its works in a particular way for a wide variety of reasons.

130 Hunt J held that the plaintiff must establish more than mere knowledge of the presence of the notice. Instead the plaintiff must establish a failure to take advantage of an opportunity to remove the notice or statement which shows that the defendant ‘consented to, or approved of, or adopted, or promoted, or in some way ratified the continued presence of that statement’.⁷⁷ Hunt J held that the failure to remove the posters within a reasonable period after their presence was brought to the Council’s attention allowed that inference to be drawn.

131 Importantly the formulation of the basis for liability in *Urbanchich* requires:

- that there be a failure to take advantage of an opportunity to remove the defamatory material (which I interpolate must be a reasonably practicable one having regard to available resources); and
- that the failure shows consent, approval, adoption or promotion of the *presence* of that statement on the defendant’s property.

132 It should be emphasised that it is approval of the presence of the material, and not of its message, that is required. Agreement with the defamatory imputation made by written material is not a necessary element of any republication of defamatory material. In the case of publication by omission, approval, by inaction, of the presence of the material posted by another operates as the equivalent of secondary participation, by commission, in its publication.

⁷⁵ *Hird v Wood* (1894) 38 Sol J 234. See also *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350.

⁷⁶ (1991) Aust Tort Reports 81-127.

⁷⁷ *Urbanchich v Drummoyne Municipal Council* (1991) Aust Tort Reports 81-127 at 69, 193.

133 There is a connection between the concept of consent, approval and adoption postulated in *Urbanchich* and the concept of authorisation explained by Gaudron J in *Thompson*. Consent, approval or authorisation to display defamatory material, if given in advance, will generally render the owner or occupier of the property a publisher and primary participant. Positive acts which demonstrate approval, adoption or promotion of the presence of publication, at least if publically communicated, will serve to make the building owner or occupier liable as a participant in the publication. Approval, adoption or promotion cannot practically be given without knowledge of the presence of defamatory material, and by reason of that knowledge the building owner or occupier may be liable either as a publisher depending on the particular act, or as a secondary participant in the publication of another. Adding to the poster in a way which highlights it or points it out may be an act of authorisation which attracts liability. If one by words or conduct draws the attention of another to defamatory words then there has been primary, or at least secondary, participation in the publication.⁷⁸ Practically, the drawing of attention to a defamatory statement cannot occur without the person knowing, or being in a position to know, of the presence of the defamatory material in what is being pointed out.

134 The trespass cases show that a defendant may be liable for the defamatory material published by another if he or she fails to take reasonably practicable steps to prevent it being seen by others after having notice of the presence of that material.

Publication on the World Wide Web

135 The first issue to be considered in the complex case of dissemination through the World Wide Web is whether Google's role as facilitator through its search engine is sufficiently proximate to the display of the search results themselves to constitute participation in the publication of their contents.

136 In its most elementary form facilitation of an electronic publication may be no more than providing a telecommunications cable. The provision of a cable that operates as an electronic super highway facilitates the ultimate publication of defamatory material in a readable form. However, words sent in cipher are not published.⁷⁹ Telecommunication providers take no steps to render the electronic signals they convey readable. Moreover, it is impossible for the provider of the cable to identify or block the electronic signals which carry the defamatory material. The provision of a cable service even after notification is no more participation in the ultimate publication than the conduct of an electricity distributor is participation in the production of drugs in a household to which the electricity is supplied.

⁷⁸ *Hird v Wood* (1894) 38 Sol J 234.

⁷⁹ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586 per Brennan CJ, Dawson and Toohey JJ, citing Neill B and Rampton R, Duncan and Neill on Defamation, 2nd Ed, Butterworths, 1983 [8.03] at pp 33-34 fn 3.

137 The social utility in the distribution of electronic signals is such that the law could not countenance cutting off the cable service altogether as a reasonably practicable measure to avoid its possible use to convey defamatory material. The provision of a telecommunications cable is not sufficiently connected to the publication for the provider to be regarded as even a secondary publisher.

138 Internet service providers go one step further than providing cables. They provide electronic protocols which allow users to exchange data with the World Wide Web. In *Bunt v Tilley*⁸⁰ (*Bunt*) Eady J struck out actions against three defendants who were internet service providers (ISPs) through which individual defendants had made defamatory posts on webpages hosted by others. Eady J held:⁸¹

[37] I would not, in the absence of any binding authority attribute liability at common law to a telephone company or other passive medium of communication, such as and ISP. It is not analogous to someone in the position of a distributor, who might at common law need to prove the absence of negligence: see *Gatley on Libel and Slander*, 10th ed, (2004), para 6-18. There a defence is needed because the person is regarded as having ‘published’. By contrast, persons who truly fulfil no more than the role of a passive medium for communication cannot be characterised as publishers: thus they do not need a defence.

139 The provision of an electronic protocol which allows a user access to the internet from his or her device plays no part in the selection of the particular information which is extracted from it. Moreover, an ISP has no practical capacity to control or limit the information obtained at the granular level needed to block particular statements or limit the information. The connection to the World Wide Web provided by ISP providers is too remote from the publication of written material on the computer screens of users to be a publication even as a secondary participant.

140 The concept of a ‘passive medium’ on which Eady J relied, even though not affecting the result in *Bunt*, is apt to mislead because the very nature of electronic media is that it is pre-programmed to fulfil a purpose. For example, an ISP programs its software and hardware deliberately so that its customers can access the internet, however the ISP exercises very little (if any at all) control over how the customers use the internet. There is an important distinction between a pre-programmed automated system and passivity. It is the degree to which electronic programmes facilitate the production of the defamatory material in a written and therefore comprehensible form which is important.

141 Webpage masters of internet forums or web-based bulletin sites which receive communications electronically but then make them readable in an organised manner by visitors to their webpages are in a very different position.

⁸⁰ [2006] EWHC 407 (QB); [2007] 1 WLR 1243.

⁸¹ *Bunt v Tilley* [2006] EWHC 407 (QB); [2007] 1 WLR 1243 at [37].

Hosts of those webpages more closely facilitate the publication of material, on their sites because:

- they invite communications on a particular subject matter (indeed, comment and discussion is the very purpose of such sites);
- they have a greater capacity to read both by virtue of the form it is in and the more limited quantity of material they receive in comparison to the data for which telecommunications cable provider or an ISP is a conduit; and
- they have a practical capacity to control the content of their website.

142 Accordingly, the hosts of webpages which invite discussion have been found to be publishers at common law in *Godfrey v Demon Internet Limited*,⁸² and *Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtecnica Corp (trading as Digital Trends)*⁸³ (*Metropolitan International Schools*).

143 In *Oriental Press Group Limited v Fevaworks Solutions Ltd*,⁸⁴ (Oriental) Ribeiro PJ explained the reasons for treating providers, administrators and managers of what was effectively an internet forum (I will refer to them as forum hosts) as publishers and distinguishing them from the proprietors of the golf club in *Byrne* as follows:⁸⁵

[50] Once the nature of the *Byrne v Deane* principles is grasped, it becomes clear that they do not apply to internet platform providers like the respondents. The provider of a discussion forum is in a wholly different position from that of the occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser.

[51] The respondents plainly played an active role in encouraging and facilitating the multitude of internet postings by members of their forum. As described in Section B of this judgment, they designed the forum with its various channels catering for their users' different interests; they laid down conditions for becoming a member and being permitted to make postings; they provided users browsing their website access to the discussion threads developed on their forum; they employed administrators whose job was to monitor discussions and to delete postings which broke the rules; and they derived income from advertisements placed on their website, a business model which obviously benefits from attracting as many users as possible to the forum.

[52] The respondents were therefore, in my view, plainly participants in the publication of postings by the forum's users and in that sense they were

⁸² (1999) EWHC 244 (QB); [2001] QB 201.

⁸³ [2009] EWHC 1765 (QB); [2010] 3 ALL ER 548.

⁸⁴ (2013) 16 HKCFAR 366.

⁸⁵ (2013) 16 HKCFAR 366 at [50]-[53].

publishers from the outset, it being in issue whether they were first or main publishers or merely subordinate publishers...

- [53] In this context, I respectfully part company with the reasoning (adopted on an interlocutory basis) of the English Court of Appeal in *Tamiz v Google Inc.* It is reasoning which proceeds on the basis that successful invocation of the defence of innocent dissemination results in the defendant being deemed not to have published at all. For the reasons previously given, I do not accept that premise. Nor am I able to accept the distinction drawn between the notice board and graffiti analogies, nor the suggestion that ‘the provision of a platform for blogs is equivalent to the provision of a notice board’. As indicated above, my view is that the provider of an internet discussion platform similar to that provided by the respondents falls from the outset within the broad traditional concept of ‘a publisher’, a characteristic not shared by a golf club or other occupier who puts up a notice board on which a trespassing message is posted.

(citations omitted)

144 The operation of the website in *Oriental* was described as follows:⁸⁶

- [12] The forum was known as the Hong Kong Golden Forum with the URL addresses ... and The forum had different discussion ‘channels’ catering for various interests of users, including channels concerning computer products and software, games, photography, academic matters, music, finance, sports, entertainment, mobile phones and leisure. The leisure channel was the most popular. Use of the forum was free, the respondents relying on advertising to generate income.
- [13] Anyone could browse the website but only persons who had registered as members were able to post messages on the forum. Someone wishing to register had to provide his or her name and certain other details, including a traceable e-mail address with a recognised internet service provider (‘ISP’), rather than a more anonymous e-mail address from a web-based provider such as Gmail, Hotmail or Yahoo. Membership was also conditional on accepting the rules of the forum which included a prohibition against postings with objectionable content, including defamation, pornography, harassment and infringing intellectual property rights. A person who successfully registered as a member adopted a forum nickname and would automatically be assigned a password. A member who violated the rules might have his membership suspended or terminated.
- [14] Although the evidence indicated that the details purportedly provided by persons registering as members were very often obviously fictitious, the condition that they provide an e-mail address with a recognised ISP was of some significance. In the present case, the appellants obtained *Norwich Pharmacal* orders which led to disclosure by the respondents of certain details of the originators of the offending statements including their registered e-mail addresses. It was through those e-mail addresses that the respondents (with the aid of Court orders) were able to trace and identify the persons concerned. The Court was told by Mr Michael Thomas SC that the

⁸⁶ *Oriental Press Group Limited v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [12]-[15].

appellants have reached financial settlements with the originators whom it chose to pursue.

- [15] There was very considerable traffic on the website. Members of the forum would develop what are known as discussion ‘threads’ involving postings expressing a user’s views on a particular topic, leading to a sequence of postings by other users with their views and comments on that topic. The evidence was that there could be 30,000 users on-line at any given time and that during peak hours, over 5,000 postings could be made each hour. There was thus no attempt to edit or filter postings before they appeared on the forum. However, two administrators were employed to monitor forum discussion for six to eight hours per day, their job being to remove objectionable content by deleting objectionable postings or discussion threads and to field complaints. Forum postings could not be downloaded and a deleted posting no longer exists in ‘cyberspace’ and can no longer be accessed by anyone. Where infraction of the rules by a user was frequent, the administrators could suspend or terminate that user’s account and so his ability to post messages on the forum.

(citations omitted)

- 145 That description of the forum host’s functions is silent as to whether or not there was a capacity to delay the posting until it had been checked. Ribeiro PJ went on to hold that forum hosts were subordinate publishers and entitled to rely on the innocent dissemination doctrine:⁸⁷

[75] As the authorities on the innocent dissemination defence show, in a newspaper setting, the journalist, editor, printers and (vicariously) the newspaper proprietor are all treated as first or main publishers. In my view, this is because they are persons whose role in the publication process is such that they know or can be expected easily to find out the content of the articles being published and who are able to control that content, if necessary preventing the article’s publication. It is because they occupy such a position that the law has held them strictly liable for any defamatory statements published.

[76] In my view, the abovementioned characteristics supply the criteria for identifying a person as a first or main publisher. They are (i) that he knows or can easily acquire knowledge of the content of the article being published (although not necessarily of its defamatory nature as a matter of law); and (ii) that he has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content. ...

...

[81] What must the publisher be shown to have known or to be expected to have known in order to be treated as a first or main publisher and so deprived of the defence? Mr Thomas submitted that it was sufficient that these respondents knew that they were hosting and making accessible a multitude of postings on the forum. They must therefore, he argued, be taken to know

⁸⁷ *Oriental Press Group Limited v Feaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [75]-[76], [81], [89].

the content of the postings or discussion threads complained of since they formed part of that multitudinous body of material. I cannot accept such a broad and indiscriminate basis for deeming an internet intermediary strictly liable as a first or main publisher. It should be stressed that adopting a more focussed requirement as to knowledge does not mean absolving a platform provider from liability. It means treating it as a subordinate publisher and throwing on it the burden of bringing itself within the innocent dissemination defence.

...

[89] When the abovementioned criteria are applied to the respondents, it is in my view clear that they are subordinate publishers and not first or main publishers of the defamatory postings ...

(citations omitted)

146 A forum host is the principal of an enterprise, whether large or small, which encourages and elicits contributions from others whether for commercial, personal or ideological reasons. On the criteria identified by Ribeiro PJ, which broadly approximate the criteria identified at [141] above, if there were a capacity to block postings until they were vetted, there would be a strong case for holding that forum hosts are primary publishers. However, it is inconsistent with the very nature of on-line real-time interactive webpages to exercise that degree of editorial control. The exercise of editorial control in advance of a complaint that material is defamatory is antithetical to that forum of communication. The decision of *Oriental* must ultimately be founded on the public utility of communications of that kind. In the context of those legal policy considerations, the fact that it is people other than the hosts who author and post on the webpage, at any time of the day or night, and on every day of the year, is sufficient reason to distinguish a forum host from the proprietor of a newspaper or television station and to treat them as secondary participants. Of course the manager of a webpage which commonly attracts defamatory material may, prospectively, be attributed with notice, or treated as the primary publisher of, defamatory comments he has knowingly or recklessly encouraged or allowed.

147 The public policy interest in treating webpage hosts as secondary publishers may be even greater if they have no capacity to vet postings in advance of them being read.

148 In *Tamiz v Google Inc*,⁸⁸ Eady J upheld Google's contention that it did not publish statements posted on a website which had been created by another person using an electronic facility Google Inc provided through a website of its own www.blogger.com (Blogger). In effect, Blogger allowed persons to create, host and control their own blogs free of charge. Eady J thought it significant that Google Inc 'is not required to take any positive step, technically, in the process

⁸⁸ [2012] EWHC 449 (QB).

of continuing the accessibility of the offending material'.⁸⁹ Eady J approximated the position of Google in that case to the position of the internet service provider in *Bunt*.

149 However, the Court of Appeal in *Tamiz v Google Inc*⁹⁰ overturned the decision holding that it was at least sufficiently arguable that Google was a publisher. Richards LJ (with whom Lord Dyson MR and Sullivan LJ agreed) said:⁹¹

[23] ... In my view the judge was wrong to regard Google Inc's role in respect of Blogger blogs as a purely passive one and to attach the significance he did to the absence of any positive steps by Google Inc in relation to continued publication of the comments in issue.

...

[25] By the provision of that service Google Inc plainly facilitates publication of the blogs (including the comments posted on them). Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any prior knowledge of, or effective control over, their content. It is not in a position comparable to that of the author or editor of a defamatory article. Nor is it in a position comparable to that of the corporate proprietor of a newspaper in which a defamatory article is printed. Such a corporation may be liable as a primary publisher by reason of the involvement of its employees or agents in the publication. But there is no relationship of employment or agency between Google Inc and the bloggers or those posting comments on the blogs: such people are plainly independent of Google Inc and do not act in any sense on its behalf or in its name. The claimant's reliance on principles of vicarious liability or agency in this context is misplaced.

...

[33] ... In relation to Blogger [Eady J] said nothing about Judge Parkes QC's analogy with the provision of a gigantic notice board on which others post comments. Instead, he drew an analogy with ownership of a wall on which various people choose to inscribe graffiti, for which the owner is not responsible. I have to say that I find the notice board analogy far more apposite and useful than the graffiti analogy. The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms.

[34] Those features bring the case in my view within the scope of the reasoning in *Byrne v Deane*. Thus, if Google Inc allows defamatory material to remain

⁸⁹ *Tamiz v Google Inc* [2012] EWHC 499 (QB) at [39].

⁹⁰ [2013] 1 WLR 215.

⁹¹ *Tamiz v Google Inc* [2013] 1 WLR 215 at [23], [25], [33]-[35].

on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material. Mr White QC submitted that the vast difference in scale between the Blogger set-up and the small club-room in *Byrne v Deane* makes such an inference unrealistic and that nobody would view a comment on a blog as something with which Google Inc had associated itself or for which it had made itself responsible by taking no action to remove it after notification of a complaint. Those are certainly matters for argument but they are not decisive in Google Inc's favour at this stage of proceedings, where we are concerned only with whether the appellant has an arguable case against it as a publisher of the comments in issue.

[35] I do not consider that such an inference could properly be drawn until Google Inc had had a reasonable time within which to act to remove the defamatory comments. it is in my view open to argument that the time taken was sufficiently long to leave room for an inference adverse to Google Inc on *Byrne v Deane* principles.

(citations omitted)

The circumstance which made the case against Google arguable in *Tamiz* was the element of control. The degree of control which is sufficient to attract liability will continue to arise in relation to other social media platforms like Facebook, Twitter and Instagram. The related public policy question of the degree to which the managers of those platforms should be given, and exercise, censorial responsibility over content based on their judgment as to what is defamatory (and more broadly inappropriate or unlawful, as is a live issue in the criminal jurisdiction) will also continue to throw up difficult issues.

150 The publication of search results by Google was found not to be a publication for the purposes of the law of defamation in *Metropolitan International Schools*.⁹² Eady J reasoned by analogy from library catalogues to support his conclusion:⁹³

[52] Analogies are not always helpful, but there will often be resort to analogy when the common law has to be applied to new and unfamiliar concepts. Here, an analogy may be drawn perhaps with a search carried out in a large conventional library. If a scholar wishes to check for references to his research topic, he may well consult the library catalogue. On doing so, he may find that there are some potentially relevant books in one of the bays and make his way there to see whether he can make use of the content. It is hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue. On the other hand, if the compilers have made an effort to be more informative, by quoting brief snippets from the book, the position may be different. Suppose the catalogue records that a particular book contains allegations of corruption against a living politician,

⁹² [2009] EWHC 1765 (QB); [2010] 3 All ER 548.

⁹³ *Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtecnica Corp (trading as Digital Trends)* [2009] EWHC 1765 (QB); [2010] 3 All ER 548 at [52]-[59].

or perhaps it goes further and spells out a particular activity, such as ‘flipping’ homes to avoid capital gains tax, then there could be legal liability on the part of the compiler under the ‘repetition rule’.

- [53] No doubt it would be said here too, by analogy, that the third defendant should be liable for repeating the ‘scam’ allegations against the claimant. Yet, whereas a compiler of a conventional library catalogue will consciously at some point have chosen the wording of any ‘snippet’ or summary included, that is not so in the case of a search engine. There will have been no intervention on the part of any human agent. It has all been done by the web-crawling ‘robots’.

(citations omitted)

151 Eady J observed that the process was completely automated and that no Google employee takes any part in the search. Eady J concluded that Google was not a publisher because the search terms were entered by others. It is difficult to see any legal significance in that fact when Google, through its employees, established and maintained the automated system. The absence of human involvement in the creation of the abstract or snippet upon a user’s search cannot detract from Google’s intention to publish, in the sense of making readable, the results of its searches. On the other hand, the automation of the process may, as I earlier observed, affect the question whether knowledge of the contents of the paragraphs created by its search engines should be attributed to it. It is that question which Eady J next addressed:⁹⁴

- [54] The next question is whether the legal position is, or should be, any different once the third defendant has been informed of the defamatory content of a ‘snippet’ thrown up by the search engine. In the circumstances before Morland J in *Godfrey v Demon Internet Ltd*, the acquisition of knowledge was clearly regarded as critical. That is largely because the law recognises that a person can become liable for the publication of a libel by acquiescence; that is to say, by permitting publication to continue when he or she has the power to prevent it. As I have said, someone hosting a website will generally be able to remove material that is legally objectionable. If this is not done, then there may be liability on the basis of authorisation or acquiescence.

- [55] A search engine, however, is a different kind of internet intermediary. It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow that the third defendant has authorised or acquiesced in that process.

- [56] There are some steps that the third defendant can take and they have been explored in evidence in the context of what has been described as its ‘take down’ policy. ...

⁹⁴ *Metropolitan International Schools Ltd (trading as SkillsTrain and/or Train2Game) v Designtecnica Corp (trading as Digital Trends)* [2009] EWHC 1765 (QB); [2010] 3 All ER 548 at [54]-[58].

[57] In this case, the evidence shows that Google has taken steps to ensure that certain identified URLs are blocked, in the sense that when web-crawling takes place, the content of such URLs will not be displayed in response to Google searches carried out on Google.co.uk. This has now happened in relation to the 'scam' material on many occasions. But I am told that the third defendant needs to have specific URLs identified and is not in a position to put in place a more effective block on the specific words complained of without, at the same time, blocking a huge amount of other material which might contain some of the individual words comprising the offending snippet.

[58] It may well be that the third defendant's 'notice and take down' procedure has not operated as rapidly as Mr Browne and his client would wish, but it does not follow as a matter of law that between notification and 'take down' the third defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a 'take down' in relation a particular URL, it is hardly possible to fix the third defendant with liability on the basis of authorisation, approval or acquiescence.

(citations omitted)

152 The analogy with acquiescence in the posting of a defamatory hard-copy bill fixed to a building is attractive but ultimately not helpful. Far from being the subject of an unwanted parasitic posting, Google's search engines are thoughtfully designed to create the snippet and hyperlink.

153 On appeal Google maintained the submission put at trial that an intention to publish had to be proved. It contended that Google could not have intended to publish any snippet when there are over 60 trillion constantly changing webpages and over 100 billion searches a month. On those statistics Google contended that it defied both logic and any form of common sense to think that one snippet 'out of a too large to calculate possible number of snippets' was in Google's mind to communicate to a person other than the respondent.

154 Google submits that the element of intention to publish defamatory material means more than an intention to commit the act of communication. Google submits that intention connotes also an authorisation or approval of the publication of the words. To make that submission good Google relies on statements in the authorities discussing the liability of a person other than the perpetrator of the act of communication in question. They are cases of secondary participation.

155 Google established the algorithm and programmes of its search engine and made that search engine available to all users of the internet. At the time of a search, Google, by the mechanism of its search engine, produces the snippet paragraphs, albeit at the request of its user. That conduct made Google a participant in the publication of the content of the paragraph to the person making the search even though that content derived from and was an electronic reproduction of, a webpage published by a third person. Google participated in

the publication of the paragraphs about Dr Duffy produced by its search engine because it intended its search engine to do what it programmed it to do.

156 It is not necessary in order to prove an intentional act of publication that Google had knowledge of or adopted, in any sense, the content of its search results. The Judge was right to conclude:⁹⁵

[184] I reject Google's contention that a defendant can only ever be a publisher if the defendant authorises or accepts responsibility for the publication. Such a test is apposite when the defamatory matter is physically attached to the defendant's property without the defendant's knowledge or permission, although in that case a better formulation of the test may be whether the defendant has acquiesced in the defamatory matter remaining on the defendant's property knowing that it will be seen by others. The posited test is not apposite when the defamatory matter is disseminated by the defendant itself and is inconsistent with the innocent dissemination doctrine. The appropriate test remains whether the defendant has participated in the publication. I agree with the decisions to this effect of Morland J in *Godfrey v Demon Internet Ltd*, Beach J in *Trkulja v Google Inc LLC (No 5)*, the Hong Kong Court of Final Appeal in *Oriental Press Group Limited v Fevaworks Solutions Ltd* and (subject to the issue of actual v constructive knowledge) the New Zealand Court of Appeal in *Murray v Wishart*.

(citations omitted)

157 To so find does not answer the question whether Google was a primary or secondary participant in the publication. Nor does it answer the further question whether, if merely a secondary participant Google knew or ought to have known of the defamatory content of the search results it published.

158 As we have seen in the case of a primary participant in a publication, knowledge of the contents of the publication is conclusively presumed but knowledge may be rebutted in the case of a secondary participant. Moreover, authorisation of the presence of defamatory material also requires, as an accompanying mental element, knowledge of the presence of that material. Even though Google establishes the program which selects the words of its search paragraphs and could therefore be regarded as a primary participant, Google is best classified as a secondary participant because the words selected are electronically reproduced from other publications and pages on the internet.

159 Google has knowledge of the probable content of the future search results of its search engine from the time someone notifies it of the existence of defamatory material in the results of a search which has been made for particular material. From that time its dissemination is no longer 'innocent'. Thereafter, the only justification for the law allowing Google, as a secondary publisher, a reasonable time to 'take down' references to the defamatory material is the public policy favouring the dissemination of information generally. For that

⁹⁵ *Duffy v Google Inc* (2015) 125 SASR 437 at [184].

reason Google may be excused from liability for publications made by its search engines for such time as is reasonable necessary to block the source URL.

160 That position was accepted in Canada in *Crookes v Newton*⁹⁶ (*Crookes*). In that case the Supreme Court of Canada considered a claim against a defendant for posting material on the World Wide Web which contained a hyperlink to another website containing the defamatory material.

161 Abella J (with whom Binnie, LeBel, Charron, Rothstein and Cromwell JJ agreed) distinguished between the direct publication of defamatory material and a reference in the sense of helping to find defamatory material published elsewhere particularly in reference and hyperlinks:⁹⁷

[26] A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting *control* over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. ...

[27] Hyperlinks are, in essence, references. By clicking on the link, readers are directed to other sources. ...

...

[29] Although the person selecting the content to which he or she wants to link might *facilitate* the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content. The ease with which the referenced content can be accessed does not change the fact that, by hyperlinking, an individual is referring the reader to other content. ...

[30] Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral — it expresses no opinion, nor does it have any control over, the content to which it refers.

(emphasis in original)

162 The reasons of Abella J emphasise the importance of control over both content and reach as an element of publication. As has been seen, control of that

⁹⁶ [2011] 3 SCR 269.

⁹⁷ *Crookes v Newton* [2011] 3 SCR 269 at [26]-[30].

kind is more indicative of primary publication and is often absent for secondary publishers. Nonetheless her Honour's reasons show that mere facilitation may not, of itself, constitute publication.

163 The criterion adopted by Abella J of 'leaving one source and moving to another' would necessarily preclude a finding of publication in all cases of referencing. That result may be inconsistent with authority,⁹⁸ and may unduly narrow the scope of liability for internet publication in which an hyperlink operates as an easy and instantaneous reference. Abella J recognised that hyperlinks are an important element of the Internet's utility:⁹⁹

[36] The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential 'chill' in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.

164 Abella J accepted that a person who provides a reference is liable for defamatory material which accompanies or forms part of the reference.¹⁰⁰

[40] Where a defendant uses a reference in a manner that *in itself* conveys defamatory meaning about the plaintiff, the plaintiff's ability to vindicate his or her reputation depends on having access to a remedy against that defendant. In this way, individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning; not because they have created a reference, but because, understood in context, they have actually *expressed* something defamatory. This might be found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source.

...

[42] Making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be 'published' by the hyperlinker. ...

(emphasis in original; citations omitted)

165 The effect of those observations is that referencing does not provide an immunity from liability for words which, standing alone, are defamatory. The extent of liability articulated by Abella J does not appear to extend to the content

⁹⁸ *Hird v Wood* (1894) 38 Sol J 234

⁹⁹ *Crookes v Newton* [2011] 3 SCR 269 at [36].

¹⁰⁰ *Crookes v Newton* [2011] 3 SCR 269 at [40]-[42].

of the hyperlinked material which is not repeated in the paragraph of the text which is hyperlinked.

166 McLachlin CJC and Fish J adopt a wider approach which includes liability for content of the hyperlinked material even if it is not repeated:¹⁰¹

[46] ... While we agree in large part with the reasons of Abella J., we respectfully propose a different formulation of the test for when a hyperlink reference in a text constitutes publication of defamatory matter to which it links.

...

[48] ... In our view, the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances. Publication of a defamatory statement via a hyperlink should be found if the text indicates *adoption or endorsement of the content of the hyperlinked text*. If the text communicates agreement with the content linked to, then the hyperlinker should be liable for the defamatory content. The defendant must adopt or endorse the defamatory words or material; a mere general reference to a web site is not enough. ...

(emphasis in original)

167 Google contends that the italicised words in that passage are used in what McColl JA described as a 'secondary sense' in *John Fairfax Publications Pty Ltd v Obeid*.¹⁰² The primary sense of adoption or endorsement is the repetition of defamatory material which generally suffices to make the publisher liable in defamation. In its secondary sense, it refers to repetition without at the same time refuting the defamatory imputation by words or conduct. Even though it is not completely clear, that appears to be the sense in which McLachlin CJC and Fish J use the words adoption and endorsement. The question whether the republication was accompanied by a refutation or endorsement goes to the element of the defamatory meaning of the republication and not to the element of publication. Google contends that the context of search results, by its manifest neutrality, is a refutation. However, at least in those cases in which there is a repetition of some of the defamatory content, it is difficult to treat the search results as refuting the defamatory content.

168 Deschamps J also accepted that a reference to defamatory material found elsewhere might expose the reference to liability for republication:¹⁰³

[87] *Byrne* and its progeny are consistent with the requirement that any finding of publication be grounded in a deliberate act. If a defendant was made aware (or had reason to be aware) of defamatory information over which he or she had sufficient control but decided to do nothing about it, this nonfeasance might amount to a deliberate act of approval, adoption, promotion, or ratification of the defamatory information. ...

¹⁰¹ *Crookes v Newton* [2011] 3 SCR 269 at [46]-[48].

¹⁰² (2005) 64 NSWLR 485 at 506, [100]-[101].

¹⁰³ *Crookes v Newton* [2011] 3 SCR 269 at [87]-[91].

...

[91] It should be plain that not *every* act that makes the defamatory information available to a third party in a comprehensible form might ultimately constitute publication. The plaintiff must show that the act is deliberate. This requires showing that the defendant played more than a passive instrumental role in making the information available.

(emphasis in original)

169 It is not obvious to me what deliberate means in this context. The concept of a 'passive instrumental role' is also problematic for the reasons mentioned in discussing the decisions of Eady J in *Bunt* and *Tamiz*.

170 There is a strong advantage in the formulation of Abella J in *Crookes* which draws a clear bright line and rules out those who merely reference the existence or location of defamatory material as a publisher. Moreover the formulation of McLachlin CJC and Fish J has the disadvantage of incorporating into the definition of publication the concept of endorsement of the defamatory content which, in the case of republication, goes to the question of whether the republication also carried the defamatory imputation. The approach of Deschamps J has the usual disadvantages of any distinction between misfeasance and nonfeasance.

171 I pause here to observe that a hyperlink does not have to take the form of a URL which once clicked will take the user to that website. Almost any text or image on a webpage can be hyperlinked. In the instant example when Google search engine returns results the heading of the webpage is hyperlinked. I understand the reasoning of Abella J to distinguish between the text accompanying a hyperlink and the content of the material on the hyperlinked webpage with only the former being the publication of the search engine operator.

172 Further a bare hyperlink is unlikely to be defamatory on Abella J's reasoning, whereas reproducing and hyperlinking a portion of defamatory text from the linked page will generally be defamatory and the party providing the link will be liable. As a general rule, that can be accepted. However, in certain circumstances, depending on both the ease with which the hyperlink can be accessed, and the information provided by the hyperlink (whether or not that information is defamatory in itself), hyper-linking can for all practical purposes constitute an incorporation of the defamatory material into the reference. If the defamatory material is incorporated into the hyperlink, the person making that reference is repeating the libel. Moreover, neutrality is not refutation. In those special circumstances the search result and hyperlink may be the electronic equivalent of handing over a text bookmarked to a certain page or line and inviting a person to read it. In that event the person providing the reference may be regarded as a secondary publisher.

173 I prefer to speak of incorporation, rather than adoption or endorsement, because lending or imparting weight to the truth of a defamatory imputation is not relevant of the law of defamation in any other context. Incorporation focusses the enquiry on whether the defamatory material is, as a factual matter, incorporated into the publication of the reference or hyperlinker. When referring to another source, the greater the information which is provided about the content of the reference material, irrespective of whether the reference repeats a defamation, the more closely connected the act of reference is to the publication of the referenced material. Indexing by reference to the title and author of the material will only rarely convey sufficient information about the contents so as to constitute a publication of the underlying webpage. However the addition of a snippet, or an abstract, of the material may do so. That is because the searcher only has to assess the snippet or abstracts presented to him or her instead of undertaking the laborious task of going to each reference and assessing them one at a time. A reference accompanied by a snippet or abstract of the defamatory material is even more likely to amount to an incorporation of the hyperlinked webpage. That is because the hyper-link, if used, will direct the searcher to that very material. A Google search paragraph is the electronic analogue of the person who places a post-it note on a book which reads 'go to page 56 to read interesting gossip about X'. This approach also sits more comfortably with the numerous ways in which a hyperlink might be constructed and thereby refer a user to the underlying page.

174 The analogy employed by Eady J in *Metropolitan International Schools*¹⁰⁴ with the library catalogue which contains a snippet or abstract of the defamatory material is useful in this context. A person who recommends a magazine, article or book to another without saying anything more about the article is not for that reason alone a secondary publisher. However if that person also informs the other that the article makes certain defamatory allegations about another he or she may well be held to be a secondary publisher. Those persons are similar to the man on the footpath who draws the attention of passers-by to defamatory words on the walls or windows of an adjacent building. The gesticulator may be a publisher of those words even if he or she has not placed them there. In my view the liability of referencers as a secondary publisher does not depend on their adoption or endorsement of the truth of the defamatory imputation. If they are publishers, it is because the additional description of the contents of the article or book more closely connects them to its publication. The more information a referencer gives, and the easier his or her assistance makes retrieval of the publication, the more his or her facilitation becomes a substantial enough cause of the publication to attract liability.

175 In *A v Google New Zealand Ltd*,¹⁰⁵ the plaintiff's claim was based on defamatory material in search paragraphs. The plaintiff's application for

¹⁰⁴ [2009] EWHC 1765 (QB); [2010] 3 All ER 548 at 561, [52].

¹⁰⁵ [2012] NZHC 2352.

summary judgment was refused. The Associate Judge also dismissed Google's application to strike out the plaintiff's claim. In *Rana v Google Australia Pty Ltd*,¹⁰⁶ the Court found that it was sufficiently arguable that Google was a publisher of hyperlinks to defamatory websites but leave to serve out of the jurisdiction was refused for other reasons.¹⁰⁷

176 In *Trkulja v Google Inc LLC (No 5)*,¹⁰⁸ Google made a *non-obstante* application asking that the trial Judge not enter judgment against Google in accordance with the verdict of a jury. The application was made on the ground that it was not open to the jury to find that Google was the publisher or to reject its innocent dissemination defence. Beach J ruled against Google holding that there was evidence to support the jury's finding that Google published the extracts:¹⁰⁹

[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.

177 Beach J distinguished the judgments of Eady J in *Bunt* and *Tamiz*:¹¹⁰

[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 circumstances where an inference of consent can be drawn.

[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*, *Metropolitan Schools Ltd v Designtecnica Corporation* and *Tamiz v Google Inc* 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. Further, while on the facts in

¹⁰⁶ [2013] FCA 60.

¹⁰⁷ [2013] FCA 60 at [58] per Mansfield J.

¹⁰⁸ [2012] VSC 533.

¹⁰⁹ *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 at [18].

¹¹⁰ *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 at [28]-[30].

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 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.

(citations omitted)

178 Even though the ruling of Beach J was made on a *non-obstante* application, it is an authoritative statement of legal principle to the effect that on the facts, which are common to this case, a search engine provider, like Google, is a publisher of the paragraphs produced in response to a search. I agree with the legal significance Beach J attaches to the programming by Google of its automated search engines. Google intends the results that its search engine produces. I also agree with his Honour’s criticism of the concept of passivity and would therefore not follow the decisions in *Bunt* and *Tamiz*.

179 In *Bleyer v Google Inc LLC*,¹¹¹ in a case where Google applied to have the matter stayed or summarily dismissed, McCallum J adopted the reasoning of Eady J in *Bunt*, *Metropolitan International Schools* and *Tamiz*. However, in *Bleyer* Google had only been given notice that the allegedly defamatory material had been published to one person for the purposes of the claim.

180 In *Wishart v Murray*,¹¹² the New Zealand Court of Appeal found that there was an arguable case that the creator of a Facebook webpage was the publisher of third party comments posted on it.

Google is a publisher of search results and the Ripoff Reports

181 Google’s search results are published when a person making a search sees them on the screen of their computer or other device. The display of the search result is only possible because Google has developed, established and maintained the information technology capable of almost instantaneously trawling the World Wide Web and extracting the data searched for. Even though the search results are readable abstracts of material maintained electronically on the World Wide Web by others, Google’s conduct is an indispensable, proximate step in its publication to the searcher. It is Google which designs the program which authors the words of the snippet paragraph. Google’s conduct is the substantial cause of the display of the search results on the screen of the searcher’s device. The first element necessary for Google to be a publisher is therefore established.

¹¹¹ (2014) 88 NSWLR 670.

¹¹² [2013] NZHC 540, 3 NZLR 247.

182 Google does not have any practical ability to review the content of those paragraphs before they are displayed. It is not reasonably practicable to constrict the speed and universality of search engines by requiring the operator of the search engine to review the search results prior to publishing them in order to avoid the publication of some defamatory material. To do so would unreasonably restrict the great utility of search engines. Internet search engines provide a reference service to a virtual library which dwarfs even the largest of the hard copy libraries human civilisation has ever produced.

183 It is impossible in any meaningful way to attribute to Google advance knowledge of the contents of the search results published by use of its search engines. By virtue of the extraordinary amount of material on the World Wide Web, the inordinate number of searches which are conducted and the close to infinite variations therein, it is unrealistic to attribute to Google knowledge of the contents of its paragraphs, let alone to prove that knowledge.

184 For that reason Google should be regarded as a secondary publisher of its search results and knowledge of their defamatory contents should not be attributed to it until notice is given. Moreover, given the nature of the internet it is necessary to further modify the innocent dissemination rule to allow a reasonable time in which to alter and modify the results obtained Google's search engine before imposing liability on Google for the publication of the paragraphs.

185 The Judge was right to limit Google's liability as a publisher to the results of searches made only after it was put on notice. Once notified Google can only be put on notice for prospective publications. Google then can reasonably be attributed with knowledge of the subsequent publications its search engine is likely to produce if it does not take steps to block the offending URL.

186 The Judge found that Google was a publisher of the underlying Ripoff Report webpage for the following reasons:¹¹³

Hyperlinked Material

...

[221] In the case of the URL contained in the paragraph extracted at [214] above, it is necessary to have regard to the text of the title and the snippet in conjunction with the fact that the title functions also as a hyperlink. The text and the hyperlink comprise an integrated whole. The text says that Dr Duffy is a stalker of psychics of whom psychics should beware and offers by clicking on the title on the Google webpage to deliver to the user the Ripoff Report webpage that provides more detail. The user does not need to enter the URL into the user's web browser; the Google website is programmed automatically to cause the browser to display the Ripoff Report webpage by clicking on the hyperlink. In these circumstances, Google is a secondary publisher of the Ripoff Report webpage if and to the extent that Google

¹¹³ *Duffy v Google Inc* (2015) 125 SASR 437 at [221]-[230].

failed to remove the paragraph incorporating the hyperlink after a reasonable time elapsed after effective notification by Dr Duffy.

- [222] This conclusion is supported by the judgment of Beach J in *Trkulja v Google Inc LLC (No 5)*, in which his Honour held that it was open to the jury to conclude that Google was a publisher of the snippets and hyperlink alike, treating the two as an integrated whole.

Paragraphs combining text and hyperlinks

...

- [226] In the case of the exemplar extracted at [214] above, the title 'Janice Duffy – Psychic Stalker Psychics Beware Of', the text stating that Dr Duffy is an embarrassment to her profession and provision of a hyperlink to a webpage entitled '...janice duffy psychic stalker...' naturally invite the reader to click on the hyperlink for elaboration. The reader may be expected to know that the original author of the words contained in the snippets and the referenced webpage is someone other than and independent of Google. This reinforces the interconnectedness between the text of the snippets and the referenced webpage.
- [227] The text of the title and snippets of the paragraph R2 [the second Ripoff Report] stating that Dr Duffy is an Australian psychic stalker who should be stopped naturally invite the reader to click on the hyperlink for explanation and elaboration of those statements.
- [228] The text of the title and snippets of the paragraph R3 [the third Ripoff Report] stating that Dr Duffy is a psychic stalker from the Respiratory Function Unit Repatriation General Hospital naturally invite the reader to click on the hyperlink for explanation and elaboration of those statements.
- [229] The text of the snippet of the paragraph R4 [the fourth Ripoff Report] stating that Dr Duffy is an Australian psychic stalker who should be stopped and who continues to stalk Kasamba psychics naturally invites the reader to click on the hyperlink for explanation and elaboration of those statements.
- [230] By publishing the relevant paragraphs, Google played a critical role in communicating the material on the external webpage to the user and was a secondary publisher of the hyperlinked Ripoff Report webpages containing the first to fourth Ripoff Report reports if Google failed to remove the paragraphs incorporating the hyperlink after a reasonable time elapsed after effective notification by Dr Duffy.

(citations omitted)

The issue of republication of the Ripoff Report webpages is finely balanced. In one sense, the search results may be viewed as an invitation but the critical question is whether Google has, through the search facility it offers, republished the defamatory material in the Ripoff Report. Ultimately I have concluded that the paragraphs incorporate the contents of the Ripoff Report. I do so because Google's facilitation of the reading of the Ripoff Report is both substantial and proximate. Google has republished the Ripoff Reports by

abstracting sufficient material to inform the searcher of its contents, by repeating and drawing attention to the defamatory imputation, and by providing instantaneous access to it though the hyperlink. The very purpose of an internet search engine is to encourage browsing and it is designed to achieve that purpose.

Publication by inference

188 Google complains that the Judge erred in finding publication by inference drawn from the results of the searches conducted by Dr Duffy and the data showing the number of searches of her name on the Google search engine.

189 First Google argues that Dr Duffy's search results might have been affected by a 'cookie' left on her electronic device by a website accessed on that device. A cookie is an electronic marker installed on a user's internet browser by a search engine. The Judge rejected Google's argument because it was not put to Dr Duffy that she had enabled a particular feature on her electronic device which attracted cookies. Nor was it put to Dr Duffy that she had, in some other way, enabled her devices to attract cookies. The Judge found on the balance of probabilities that Dr Duffy's computer did not have the cookie:

[314] Google contends that the priorities assigned by Google's algorithms for Dr Duffy's later searches may have been influenced by her earlier search results in the manner described by Mr Madden-Woods. Mr Madden-Woods gave evidence that this occurs if the user has signed in to the Google system and has enabled the feature 'Web & App Activity' or if the user has a specific cookie stored on the user's computer and link to the browser and has not removed that cookie. As to the first, it was not suggested to Dr Duffy in cross-examination that she had enabled the feature 'Web & App Activity' and I find that this is unlikely. As to the second, it was not suggested to Dr Duffy in cross-examination that she did something to attract the cookie. Given Google's knowledge and expertise, there was an evidentiary onus on Google to adduce some evidence that Dr Duffy was likely to have this cookie on her computer. Dr Duffy's search results do not appear to show any logical progression if earlier search results were affecting later search results. In addition, Ms Palumbo's first search in June 2010 produced search results linking to the first and second Ripoff Report webpages when she had no relevant search history and her subsequent 2010 search also did so in circumstances in which she gave evidence that her husband regularly removed cookies. I find on the balance of probabilities that Dr Duffy's computer did not have the cookie.

190 The appellant has not shown any error in the Judge's reasoning in this respect.

191 Google also complains of the Judge's finding that identical Google searches carried out at identical times by two different users in Australia would return the same paragraphs and display them in the same order.

192 The Judge found, based on the evidence of Mr Madden-Woods, a Google software engineer, that:

[38] The Google search program, in contradistinction to the crawler and indexer programs, operates in real time when a user initiates a word search on a Google website. It compiles a list of paragraphs (title, snippet and URL) relating to the webpages that contain the word or words entered by the user in the search box. If two or more words are entered, unless otherwise instructed by the user, it will only return results relating to webpages that contain all of the words entered. It ranks or prioritises the paragraphs in accordance with a ranking algorithm designed to present the most relevant results first. The ranking algorithm has regard to over 200 signals or factors, most of which are proprietary information. The search program displays 10 paragraphs or search results per page (screen) ranked in order by the ranking algorithm. The search program typically produces results in a fraction of a second and operates automatically in accordance with algorithms written by human beings.

[39] The search program, and in particular the ranking algorithm, operates differentially between different Google country code domains. Subject to two exceptions, identical searches carried out at identical times by two different users in Australia on the Google Australian website return the same results in the same order. The first exception applies if the user has signed in to the Google system (entering username and password) and has enabled the feature 'Web & App Activity'. The second exception applies if the user has a specific cookie stored on the user's computer and linked to the browser and has not removed that cookie. If either exception applies, the search program will take into account the user's search history, at least over the previous 180 days, in applying the ranking algorithm.

193 Mr Madden-Wood testified that several other factors including the location within Australia from which the search is made, and the data centre in which the search is processed, may affect, albeit in relatively minor ways, the results displayed. Nonetheless, on his evidence the primary determinant was the search terms. Even though the Judge stated the effect of Mr Madden-Wood's testimony in [39] of his reasons in terms which were too absolute, the misstatement does not affect the Judge's ultimate finding as to the publication of search results concerning Dr Duffy. It is probable that the results appeared in the form found by the Judge, even though for the reasons given by Mr Madden-Woods, there is some possibility of some variation in the search results read by some searchers.

194 Google complains that the Judge erred in finding that the search results identified as A, B, C, D, and E conveyed defamatory meaning when the evidence did not permit any finding to be made about the precise words, or the whole context in which the words of the paragraphs appeared in any particular search. Google contends that it is not possible to exclude the possibility that the search results might have included words which were an effective antidote.

195 I reject Google's submission. There was a sufficient evidential foundation in the printouts of the searches made by Dr Duffy for the Judge to be satisfied

that the results of the searches, which he inferred were made, did not include material which negated the defamatory meaning conveyed by the paragraphs. The evidence did not disclose any reason to believe that the variation in search results might be such as to include words which were an effective antidote. There was very little in the contents of the underlying webpage which might have been abstracted by the search engine and have provided an antidote. The appellant has not shown that the Judge erred in drawing the factual inference which he did.

196 Google also challenges the finding of the fact of publication to a substantial number of persons. Google refers to the evidence that there was a substantial difference between the number of searches conducted from unique IP addresses after August 2013 and the number of searches generally. Google contends that that contrast shows that many of the searches counted by the Keyword Tool on the Ad Words website were searches conducted by the same person or persons. Google contends that because Dr Duffy had no public profile before commencing her blog and her action against Google, it is implausible that there was a publication of the defamatory search results in 2010 to 500 different persons searching for Dr Janice Duffy and to a further 700 different persons searching for Janice Duffy.

197 The numbers to which Google's complaint refers were determined by the Judge on the assessment of damages, after judgment was given on liability. On the subsequent hearing to determine the quantum of damages, evidence was adduced in the form of an affidavit of a software engineer, Mr Chi. Mr Chi's evidence was explained by the Judge in his Honour's reasons on damages as follows:¹¹⁴

[111] In my reasons for judgment on liability, I referred to evidence adduced by Dr Duffy using Google's Keyword Tool that showed that from September 2010 to August 2011 there were 210 average monthly searches for the phrase 'Dr Janice Duffy' and 480 average monthly searches for the phrase 'Janice Duffy' (which would include the 210 searches for 'Dr Janice Duffy'). I found that there was no reason why the search number would have been materially different over the period from January to December 2010. I now have the benefit of evidence from Mr Chi who largely confirmed the basis on which I made those findings. In addition, Mr Chi gave evidence by his affidavit that each time a searcher moves to a new page of search results, the Keyword Tool counts the move as a new search and each time a searcher returns to the search results after clicking on a hyperlink, the Keyword Tool counts the return as a new search. I therefore reassess the number of searches by Dr Duffy and others on the basis of all of the evidence now given. For clarity, I refer to a search as commonly understood as a 'search' and a search as measured by Google's Keyword Tool as a 'KT click'.

[112] Google tendered at the first trial copies of searches by Dr Duffy for 'Dr Janice Duffy' and 'Janice Duffy' in 2010. These showed a total of 28 pages in seven searches for 'Dr Janice Duffy' and 31 pages in seven searches for

¹¹⁴ *Duffy v Google Inc (No 2)* [2015] SASCF 206 at [111]-[114].

'Janice Duffy'. This is an average of approximately four KT clicks per search under either name. Dr Duffy said in evidence that on one occasion she searched more than 20 pages of search results. An allowance needs to be made for this and for occasions when Dr Duffy searched additional pages beyond those printed out or followed a hyperlink and returned to the search results page. Dr Duffy gave evidence that she lost some search results from mid-2010 and implicitly that she did not print out all search results. She estimated the frequency of her searches at once a fortnight or three weeks or a month.

[113] I find that Dr Duffy's searches for 'Dr Janice Duffy' account for 250 KT clicks compared to 2,500 total KT clicks for 'Dr Janice Duffy' in 2010. I find that Dr Duffy's searches for 'Dr Janice Duffy' and 'Janice Duffy' account for 500 KT clicks compared to 5,700 total KT clicks for 'Janice Duffy' in 2010. I find that searches by Dr Duffy's and Google's lawyers and others as a result of Dr Duffy's notifications to Google and the institution of this action from September 2010 to August 2011 (being the period for which the Google Keyword Tool is available) account for an additional 100 KT clicks. This leaves the predominant searches having been undertaken by third parties.

[114] Some external searchers will only have searched the first page of search results and their searches will be counted as one 'KT click'. Others will have searched two or three pages of search results. While some will have searched more pages, this would be a relatively small percentage of all searchers. Most searchers will have clicked on a hyperlink and then returned to the search results, although some will not. I find that on average each search by an external searcher resulted in Google's Keyword Tool recording four KT clicks. Subtracting Dr Duffy's searches, searches by lawyers and others associated with Dr Duffy's notifications and action, and allowing for multiple KT clicks per actual search results in approximately 500 searches in 2010 for Dr Janice Duffy and 700 searches in 2010 for 'Janice Duffy' (excluding searches for Dr Janice Duffy). Some of these searchers will have conducted multiple searches during 2010 and others will have only conducted a single search. However, each search is a separate publication even if conducted by the same person.

(citations omitted)

198 It is important to observe that the Judge did not find that 500 persons searched for Dr Janice Duffy and that 700 persons searched for Janice Duffy. The Judge found only that that number of searches were made and expressly recognised that a smaller number of searchers might have made multiple searches.

199 However, Google's contention that the Judge should have found that only an insignificant or trivially small number of persons made searches fails to take into account the controversy which was generated by the publication of the Ripoff Reports between the psychics and their supporters on the one hand, and disgruntled consumers like Dr Duffy on the other. As well as persons searching the World Wide Web for information about Dr Duffy for personal or professional reasons many others may have searched for her name because they had come

across it their following of the activities of internet psychics. There is therefore nothing inherently improbable about the Judge's qualitative, and not quantitative, finding that a substantial number of persons made searches. However, as shall be seen, the explanation for the origin of, and reasons for, making those searches affects the question of qualified privilege. In that respect, having regard to the Google search data about the number of different IP addresses used in the year ending October 2014 and human habitual behaviour generally, it can be inferred from this data that no more than several hundred different searchers were responsible for the searches which were made. On the evidence of Dr Duffy's on-line activities, the number of searches attributed to her is conservative. So, too, was the number of KT clicks attributed to each independent searcher. Searchers who were particularly interested in the psychic controversy are likely to have moved between the search results and a number of hyperlinked web pages. Moreover, persons with that particular interest could be expected to repeat their searches from month to month.

200 In the course of the hearing of the appeal, counsel for the respondent submitted that an adverse inference should be drawn against Google because 'notwithstanding that proceedings had been commenced in March 2010 evidence was given that [data of searches conducted on the names Janice Duffy and Dr Janice Duffy] had been destroyed up until March 2011'. As I earlier observed Google interrogated its system and obtained data with respect to the number of searches undertaken from separate IP addresses in the period of 12 months prior to 31 October 2014. The Judge observed:¹¹⁵

[309] Google has not retained any data showing the number of searches on the Google Australian website for 'Dr Janice Duffy' and 'Janice Duffy' before August 2013. That data would have been available for at least the 12 months ending in March 2011 if Google had chosen to retain it upon being served with the summons in the action.

201 The Judge's observation that Google could have retained the data for the 12 months before March 2011, when it was served with Dr Duffy's summons, must be approached with some care. Google produced the information for the 12 months preceding 31 October 2014 by specific interrogation of its system for that purpose. Google's search engine, like other information technology systems, produces an electronic trail of its use. In one sense Google therefore had the data locked within its systems at all times. However, the electronic trail itself is not necessarily readily accessible or in a readable form. It requires a program to be extracted and read. Only on conducting a search with such a programme is the data revealed. For that reason, contrary to the submission made by counsel for Dr Duffy on the appeal, the Judge's finding does not necessarily mean that records were destroyed by Google. Indeed, if the Judge had so found that finding would be unsupported by the evidence. Google may simply not have produced a readable report. There was no evidence adduced at trial, and no finding made,

¹¹⁵ *Duffy v Google Inc* (2015) 125 SASR 437 at [309].

that Google chose not to produce the report because it believed the information would be adverse to it.

202 Google challenged the Judge's finding at [309] by ground 25 of its Third Notice of Appeal. However, on the hearing of the appeal, Google, having abandoned its appeal on damages, did not press that ground until the submission was made by Dr Duffy's counsel that an adverse inference should be drawn against Google on the extent of publication. It is therefore necessary to deal with Google's ground 25.

203 On 17 July 2014 Dr Duffy made an interlocutory application for discovery of documents recording details of persons (by reference to their IP address) who searched for her name on any Google search engine from 12 September 2009 to the date of the application. In opposition to that application Google filed an affidavit of a software engineer explaining that much time and many resources would have to be committed to comply with Dr Duffy's request.

204 On 5 November 2014 Google offered to create a document containing certain data for the period between August 2013 and October 2014. That information is the data referred to in [308] of the Judge's reasons and [59] of my reasons.

205 The Google data was provided to Dr Duffy's solicitors but on 4 March 2015 they wrote to Google's solicitors informing them that they were not satisfied with that material. They renewed Dr Duffy's application of 17 July 2014. The Judge heard submissions on the renewed application on 1 April 2015. On that day the Judge ordered:

6. The defendant is to file and serve by 4.30pm on 15 April 2015 an affidavit by a suitably qualified computer expert deposing to the existence of raw or aggregated data recording the matters addressed under the heading 'Server Logs' on pages 2 and 3 of the Google document entitled 'Key Terms' being exhibit five to the affidavit of Edward Howard Guthrie sworn on 17 July 2014.
7. If the plaintiff intends to seek an order under r 142(2)(d) of the Rules in respect of that data the plaintiff is to file and serve an interlocutory application and supporting affidavit by 4.30pm on 22 April 2015.

206 On 15 April 2015 pursuant to Order 6 Google filed and served the affidavit of a software engineer. That affidavit also dealt with the method, time and resources required to comply with Dr Duffy's request. Dr Duffy did not file any interlocutory application of the kind contemplated by Order 7. At a directions hearing on 4 May 2015 the Judge ordered that the affidavit of the software engineer filed by Google be sealed. There was no other discussion of Dr Duffy's application for discovery of documents recording searches of her name.

207 In an email to the Court on 9 June 2015 Dr Duffy foreshadowed that she would 'press the issue of further disclosure'. On the first day of trial, 22 June

2015, the Judge declined to further entertain the application for disclosure. Dr Duffy did not lead any evidence at trial to show that Google had the capacity to, but had decided against, producing any other data about the number of searches of Dr Duffy. Naturally, therefore, Google did not adduce any evidence from the software engineer at trial.

208 As I have observed, counsel for Dr Duffy has misstated the effect of [309] by treating it as a finding that Google destroyed documents. In the absence of any evidence at trial about Google's practical capacity in 2015 to retrieve the earlier data an adverse inference cannot be drawn against it. On the other hand the fact that, in 2015, Google did produce a summary of the data held within its search engine by reference to IP users for the preceding year supports an inference that if Google had chosen to do so it was reasonably practicable to produce similar reports, from at least the time it became aware that Dr Duffy had instituted her action. To that extent the Judge's finding has an evidential basis even though the software engineer's report filed on the interlocutory applications was not received at the trial.

209 However, an adverse inference should not be drawn from Google's failure to do so soon after the institution of Dr Duffy's action, and before Dr Duffy made a specific request for additional discovery. It can be accepted that Google appreciated the relevance of the information. Google may have chosen not to create evidence of publication to help Dr Duffy prove her case. However, the relevant question here is whether the data Google might have retrieved would have been more favourable to Dr Duffy than the Ad-Words Data. The Google Data obtained in 2015 for the period 1 August 2013 to 31 October 2014 supported Google's case. That is not surprising because it was likely that multiple searches would be made by the same user (and the evidence as to KT clicks supports such an inference). Dr Duffy's multiple searches are an obvious example which accounted for many of the Ad-Words searches. There is no reason therefore to analyse the Ad-Words data more favourably to Dr Duffy than to Google by reason of that failure. Dr Duffy's contention that an inference should be drawn against Google for not producing the data for earlier years in a readable form must be rejected.

210 Google also complains that the Judge found that it had published the Ripoff Report even though the Judge did not expressly find that any of the persons who followed the hyperlinks from the Google search results actually read the Ripoff Report webpages. Google contends further that such a finding could not be supported by the evidence and would be purely speculative.

211 The Judge did find that a substantial number of persons who conducted searches of the names Janice Duffy and Dr Janice Duffy and read the paragraphs concerning her relating to the first and second Ripoff report webpages 'followed the hyperlinks to those pages'.¹¹⁶ It is implicit in that finding that those persons

¹¹⁶ *Duffy v Google Inc* (2015) 125 SASR 437 at [318], [324].

read the webpages. The Judge could not rationally have made the finding which immediately followed that ‘Google published the ‘first and second Ripoff Report webpages to a substantial number of users’ had he not so intended.¹¹⁷ Google’s contention that the evidence does not support that implicit finding should also be rejected.

212 Moreover if one employs an understanding of human behaviour and draws inferences from the facts, the finding is supported by the evidence. There was a sufficient evidential basis for the Judge to infer that some of the persons who made the searches and obtained the resulting paragraphs A to D followed the hyperlink. The very purpose of a search engine like Google is to find webpages on the World Wide Web which contain the information for which users are searching. For that very reason those users are likely to follow one or more of the hyperlinks in the displayed paragraphs to the webpage. Human curiosity is a powerful force which in large part, explains the exponential growth of the Word Wide Web. The ease of reference provided by internet search engines entices many to ‘surf’ the internet. A person who has gone to the trouble of following a hyperlink to a webpage is likely to read it. Some may stop their search midstream but at least some, if not most, will read the page which they have brought up on their screens. After quickly perusing the webpage, some may realise that it does not contain the information they want and move on, but some, at least; will read more. It is also a matter of common experience that people may suddenly lose interest or be called away. However, it is probable that many will read the material which they have accessed by using a hyperlink. In fact, the anomalous result would be following through to a webpage and the searcher being able to evaluate whether that webpage satisfied their search without reading it. Google’s contention that a finding to that effect is no more than speculation must be rejected.

Capacity to convey

213 The question of capacity to convey and whether that meaning was actually conveyed merged because the trial of the action was conducted by judge alone. The Judge found that certain of the pleaded imputations were in fact conveyed. However, Google submits that assuming that the text, if it had been published other than in the setting of a Google search, could, and indeed did, convey the meanings found by the Judge, the words were not capable of conveying those meanings in the setting of Google’s search results.

214 Google complains that the Judge erred in finding that the search results in paragraphs A to E conveyed the pleaded imputations because the ordinary, reasonable reader would have understood them to be no more than abstract indicia of the information which may be found on the identified webpage. Google contends that the ordinary reader would not have understood the paragraphs as statements capable of conveying truth or falsity. Google also

¹¹⁷ *Duffy v Google Inc* (2015) 125 SASR 437 at [319], [355].

complains that the Judge wrongly relied on the repetition rule in that even if the ordinary reasonable reader is aware that Google only reproduces content of external websites without vouching for it, it will still be liable.

215 Google contends that the repetition rule must be adapted to the exigencies of the World Wide Web. Google submits that it is necessary to consider the context, circumstances mode and manner of publication when determining whether words are capable of conveying the pleaded defamatory sentences. It submits that the context must be broadly construed to include all the surrounding circumstances and relies on *Amalgamated Television Services Pty Ltd v Marsden*¹¹⁸ and *Hockey v Fairfax Media Publications Pty Ltd*.¹¹⁹ So much can be accepted but ordinarily context refers to matters perceived on the face of the publication, from words and images which accompany the impugned text.

216 Google submits that the relevant context here included the following:

- That the web is comprised of many trillions of webpages and that search engines only exist because of the size, complexity and dynamic variability of the information available on it.
- Webpages are not uploaded onto the web by the search engine operator and responsibility for the editorial content and for the presence on the web therefore rests with third parties.
- The nature of the web critically distinguishes it from other much more static and smaller universes of data even very large collections of hardcopy data such as libraries of books and newspapers.
- That mechanism by which search engines operate is that user's requests are framed as search terms chosen by the user for the purposes of generating organic search results over which the search engine, in this case Google, has no control.
- For a search engine to be of any utility it must be designed as a completely automated system with no real time control.
- Search engines only reflect content that is available on the web without any editorial control.
- The interaction between the user and the search engine is always dynamic.
- Search results are automatically returned by algorithms that have crawled and indexed the web and selected some pages as first,

¹¹⁸ (1998) 43 NSWLR 158 at 165-167 per Hunt CJ at CL.

¹¹⁹ [2015] FCA 652 at [63]-[73] per White J.

containing the search terms entered by that user and second being the most relevant as evaluated by automatic algorithm to the users query.

- The snippet is automatically generated text which assists the user in better evaluating the reference.
- Search engines are not capable of ascertaining the meanings that are conveyed by the words.

217 Google submits that the reasonable user who has access to a computer connected to the internet will have a basic knowledge and understanding of the World Wide Web. He or she may not have a close familiarity with the search engine, but will have an elementary understanding of how it works. In this respect, Google relies on *ACCC v Trading Post*:¹²⁰

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

218 Accordingly, Google contends that the ordinary reasonable user of a search engine would understand that search results are no more than automatically generated abstracts indicating where material that is possibly relevant to their interest might be found. The reader would therefore not understand the paragraphs of the search results to convey any defamatory meaning.

219 Google's submission should be rejected. The context on which Google relies shows that Google is abstracting material, defamatory or otherwise, posted by others, but does not affect the meaning which the words carry. That context, as will shortly be discussed, raises questions of the public's interest in the dissemination of information which affects the defence of qualified privilege. However, it is not an element of the tort of defamation that the person communicating the defamatory material either expressly or impliedly vouches for its truth. As was earlier observed, a person communicating defamatory material may expressly negate and nullify the effect of the communication by words or conduct, but generally a bare repetition without the provision of an accompanying antidote is not sufficient.

220 The proper construction of the text of the publication, and in particular the meaning that the reasonable person would attribute to the text and images, is not affected by the nature of the defendant's participation in the publication. The

¹²⁰ (2011) 197 FCR 498 at [122] per Nicholas J.

meaning of, and any defamatory imputation, made by the publication is not affected by the purpose or intention of the person who publishes it. Nor is it affected by the nature of the process which has resulted in the publication unless, for some reason, that process is capable, on the face of the publication, of affecting its meaning.

221 Moreover, *ACCC v Trading Post*¹²¹ on which Google relies was an action by the ACC against Google relating to a number of trading corporations that paid Google to place advertisements in the form of ‘sponsored links’ on displays of search results. The Court held that Google did not make the representations appearing in the sponsored links. There is a critical distinction between the publication of a defamation and the making of a representation. A reasonable person would not understand the publisher of a hardcopy or electronic document containing advertisements placed by others to be joining the advertisers, in making the representations about the product or services appearing in the advertisement. For that reason the publishers of newspapers, radio and television broadcasters, and the hosts of webpages, will not reasonably be understood by members of the public to be themselves making, or binding themselves, to the representations of their advertisers. In contrast, the law of defamation does not require, as a condition of liability, that the publisher represent, or otherwise warrant, that the impugned statement is true.

222 Google abandoned those grounds of appeal which complain that the Judge erred in findings as to the particular defamatory meanings attributed to each of the paragraphs based on the text alone.

223 Google also contends that the Ripoff Report webpages were incapable of conveying the defamatory meanings found by the Judge because the reasonable reader would appreciate that the ‘long threads’ of posts making and supporting complaints or responding to them on that website are mindless, unthinking, and therefore obviously unfounded, comments and not assertions of fact. Google relies on an analogy between posts on webpages and vulgar abuse.¹²² However, unfounded, unthinking or vulgar abuse may nonetheless be defamatory.¹²³ The test is whether the reasonable reader understands that the words are not intended seriously. Some posts on webpages are tongue in cheek or obviously humorous. Some are posted earnestly and the imputation is intended. The mere fact that the imputation is a post on an internet bulletin site does not deny its capacity to convey a defamatory meaning. The text and context of the posts on the Ripoff Report would lead the reasonable reader of the ‘threads’ to conclude that they were neither jests nor exclamations of abuse. The reasonable reader would understand the posts to be assertions of fact.

¹²¹ (2011) 197 FCR 498.

¹²² *Smith v ADVFN Plc* [2008] EWHC 1793 (QB) at [13]-[17] per Eady J.

¹²³ *Bennette v Cohen* (2005) 64 NSWLR 81 at [51] per Bryson JA.

224 Dr Duffy abandoned paragraphs [3.7]-[3.12] of her cross-appeal which had complained of the Judge's failure to find that all of her pleaded imputations had been established.

Truth of the imputations

225 Google did not contend that the pleaded imputations, if found to have been made, were not defamatory. As a result little attention was given at trial to the sense in which the pleaded imputations should be understood. The imputations that Google sought to justify¹²⁴ were that:

- 1 the plaintiff stalks psychics;
- 2 the plaintiff harasses psychics by persistently and obsessively pursuing them;
- 3 the plaintiff misused her government work email address by sending emails for non-work or other wrongful purposes.

226 The Judge found that the third imputation was justified. In considering whether or not Google had justified the first two imputations the Judge set out some dictionary definitions of the words used and then said:

[421] The word 'stalk' evolved during the twentieth century from its traditional meaning to refer to stalking a person rather than game. The conduct is still covert and surreptitious. The purpose however is not to kill or capture game but to invade the privacy of the victim for inappropriate and unacceptable purposes such as voyeurism or to harm the victim. Regardless of the specific purpose, the conduct if discovered by the victim is calculated (although not intended because of the covert nature of the activity) to cause the victim to feel fear or apprehension.

[422] The word 'stalk' evolved further to encompass not only covert conduct but also overt conduct where the victim is physically pursued in an inappropriate and unacceptable manner that invades the victim's privacy and is calculated to cause the victim to feel fear or apprehension. Finally, the word evolved to encompass similar conduct except the pursuit of the victim is undertaken by following the victim by electronic means (video, telephone, email, internet messaging, etc) rather than physically. In this variation, the victim's privacy is still invaded, the conduct is still inappropriate and unacceptable and the conduct is still calculated to cause the victim to feel fear or apprehension. There are thus now two species of stalking being the covert and overt species.

[423] The modern understanding of stalking described in the previous two paragraphs is the sense in which the word was used in the first and second

¹²⁴ Google also seeks to justify the imputations that the plaintiff inflicts injury, hardship, loss or ill-treatment on others and that the plaintiff has an obsession with people who use, or claim to use, paranormal powers to provide a service predicting specific events in individual people's future and unfairly tarnishes their reputations but these imputations are not established.

Ripoff Reports and in the paragraphs on the Google Australian website derived from them and from the first 123 People webpage.

227 Those paragraphs of the Judge's reasons set out the following modern meanings of stalking:

- Covert surveillance which invades privacy for inappropriate and unacceptable purposes such as voyeurism or to cause harm;
- Overt or covert conduct which if discovered by the victim is likely to arouse fear or apprehension;
- Overt conduct which invades the victim's physical or electronic space in a way which is calculated to cause the victim to feel fear or apprehension.

228 I agree that stalking includes the conduct identified by the Judge but it extends further.

229 The modern, wider, meaning of stalking finds expression in s 19AA of the *Criminal Law Consolidation Act 1935* (SA) which includes 'unlawful stalking'. Section 19AA proscribes among other things:

- publishing or transmitting offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, the other person; or
- communicating with the other person, or to others about the other person, by way of mail, telephone (including associated technology), facsimile transmission or the internet or some other form of electronic communication in a manner that could reasonably be expected to arouse apprehension or fear in the other person.

230 I considered the social mischief to which that provision is directed in *Phillips v Police*.¹²⁵

[20] Section 19AA was amended in 2001 to ensure that cyberstalking, including posting information about a victim on the internet, was covered by the offence of unlawful stalking. The Honourable the Attorney-General Trevor Griffin said:

Like other stalking behaviour, much of this may be behaviour which under different circumstances would be considered 'normal'. What makes this behaviour stalking is the intention of the perpetrator either to cause physical or mental harm to the victim, or to cause the victim to feel serious apprehension or fear.

¹²⁵ (2016) 125 SASR 427; [2016] SASC 135 at [20]-[23].

- [21] Serious apprehension or fear is one which is accompanied by anxiety, distress, depression or other emotional and psychological upset. The extent to which those conditions must be intended to interfere with a person's social, family or working life to be classified as serious necessarily requires an evaluative judgment by the tribunal of fact. It will be influenced by community standards as to what is part of modern social exchanges and what is unacceptably harmful and destructive of another's right to participate safely in them.
- [22] The framing of s19AA of the CLCA, without limiting the fear or apprehension by reference to subject matter and the extension from mental harm to serious fear or apprehension, provides it with the necessary flexibility to deal with behaviour which is increasingly concerning the public.
- [23] In the article *Regulating Cyberbullying: A South Australian Perspective*, Ms Colette Langos described cyberbullying as follows:

Cyberbullying – A Snapshot of the Phenomenon

... To date, a universal definition has not been agreed upon. However, the general consensus among scholars is that cyberbullying can be defined as intentional and aggressive on-line conduct intended to harm another who cannot easily defend him or herself. The elements of aggression, intention, power imbalance and repetition are widely accepted as being crucial criteria of a cyberbullying definition. ... In a cyberbullying context, harm includes emotional harm which involves a broad range of negative emotions including annoyance, humiliation, short-term grief, fear, and anxiety, as well as more severe forms of harm in the form of protracted psychological injury and serious long-term psychological harm.

Cyberbullying can be *direct* or *indirect*. Direct cyberbullying occurs where the cyberbully directs the electronic communications to the victim only (as opposed to communications which are posted to publically accessible areas of cyberspace). ... Indirect cyberbullying occurs in instances where the electronic communication is not sent directly to the victim. Instead, the cyberbully posts the communication to a publically accessible area of cyberspace. Public forums such as social media sites, publically accessible blogs and websites, and video sharing websites are obvious examples of platforms which fall within the public on-line domain. ... The communication has the potential to spread exponentially given that any of the recipients could forward, save and repost the material at a later stage. ...

There are an immensely broad range of behaviours the phenomenon encompasses. The various manifestations can be categorised into eight main forms:

Harassment which involves repeatedly sending offensive messages to a target.

Cyberstalking which involves intense harassment and denigration that includes threats or creates significant fear in the

victim. Harassment becomes cyberstalking when a victim fears for their personal safety.

Denigration may involve making a derogatory comment about the target. There are several manifestations of this conduct. It can occur using words or can involve the dissemination of a derogatory, sexual or non-sexual image.

Happy slapping involves the filming of a physical assault on a victim and the subsequent distribution of the film to humiliate the victim publically.

Exclusion involves a victim not being allowed to enter on-line 'areas' such as particular chat room discussion group by being purposely excluded by members of those on-line domains.

Outing and trickery are tactics applied together. It involves a situation where a perpetrator manipulates the victim into disclosing information that the perpetrator then publicises in order to humiliate the victim.

Impersonation or Masquerading involves the perpetrator pretending to be the victim and sending an offensive message that appears to come from the victim.

Indirect threat is a form of cyberbullying which relates to cyberstalking in that it refers to an on-line communication of impending physical harm. Unlike cyberstalking, this form relates to a single threat of physical harm made indirectly in the public on-line domain.

(citations omitted)

231 The contemporary meaning of stalking includes disseminating material through the internet which is calculated to be brought to the attention of the victim, or people who know the victim, with the intention of denigrating or shaming the victim. Internet stalking extends to scattering harmful material of that kind along the cyberpaths used by a victim, or by his or her cyber-community, hoping to cause distress especially when it is brought to his or her attention. In this respect there is an analogy with the person who walks ahead of, or follows behind, another shouting out disparaging accusations.

232 Stalking also connotes an element of impropriety or unlawfulness. The impropriety must be judged according to norms derived from the underlying values of the community. To justify the imputation therefore Google must establish that the exchanges in which Dr Duffy engaged were unlawful or improper. Communications in many areas of social intercourse may be offensive and insulting without being improper. Politeness is a desirable, but not mandatory, social convention.

233 Finally the imputation that Dr Duffy stalks psychics also connotes that Dr Duffy does so persistently or obsessively. At the very least, it connotes that Dr Duffy had a strong proclivity to do so.

234 In summary, to justify the imputation Google had to show that Dr Duffy persistently did, or had a strong proclivity to, make unlawful or improper posts on the internet which were calculated to shame or denigrate psychics or cause them substantial distress.

235 Dr Duffy's communications were made in a public communications forum on the contested question of the social value, and ethical standards, of internet psychics. Robust on-line criticism of psychics is not, without more, improper. Equally psychics may respond in kind in their personal or collective defence. Dr Duffy's posts about Fruno, Powerful Vision and Master Z were robust, but not improper, criticism. The Judge correctly found that Dr Duffy's conduct in that respect did not amount to stalking.

236 However the propagation by Dr Duffy of the lie that Sun was responsible for the death of a woman by playing on her romantic vulnerability was an improper falsehood intended to denigrate and shame Sun. It was also likely to cause Sun substantial distress. The falsehood was contained in two posts on 18 and 19 December on the website on which Sun's services were promoted and on a post on the Ripoff Report on 28 December 2007. Moreover the lie was disseminated under cover of a pseudonym by which Dr Duffy pretended to be the husband of a friend of the victim.

237 The Judge correctly found that conduct to be reprehensible but the Judge concluded that the posts did not amount to a stalking of Sun because it was one off conduct and because Sun did not read them:¹²⁶

[451] Dr Duffy's conduct towards SunshiningUponYou on 18 December 2007 was reprehensible and would have caused substantial distress to SunshiningUponYou if Sun had given any credence to the allegation that a former client had committed suicide. Dr Duffy's conduct was offensive but it did not amount to stalking. It was one-off conduct. It did not have the elements of pursuit or invasion of privacy. Nor did it amount to obsessive and persistent harassment.

238 On the extended meaning I would give the word stalking in the context of the internet, it was not necessary to show that Sun had read Dr Duffy's post for it to constitute stalking. Moreover the three posts, together, did constitute a stalking of Sun because Dr Duffy deliberately disseminated false accusations of a shocking nature against Sun which were, objectively calculated and subjectively intended, to shame and denigrate Sun and cause substantial distress. That conduct was grossly improper when measured against the standards of right thinking people. Dr Duffy stalked Sun by making those three posts.

¹²⁶ *Duffy v Google Inc* (2015) 125 SASR 437 at [451].

239 However the imputation in the impugned paragraphs is that ‘Dr Duffy stalks psychics’. Read literally it is that Dr Duffy stalked more than one psychic or stalked the same psychic on more than on occasion. It is not merely that on a single occasion Dr Duffy stalked a single psychic. To claim that a person stalks others is to suggest that they have a continuing tendency to do so. It would be correct to say that Dr Duffy stalked psychics if she frequently targeted with improper posts a single psychic on the grounds of his or her practice as a psychic. It could also be said that Dr Duffy stalked psychics if she had made similar false complaints of fictitious deaths against other psychics.

240 Even though Sun was the target of three posts over a period of about ten days, all three posts made the same false claim about Sun. They constituted a single act of stalking. They did not justify the imputation that the (improper) stalking was persistent or obsessional or even that Dr Duffy had a proclivity to stalk psychics.

241 The attempt to justify the additional pleaded imputation that Dr Duffy harasses psychics must fail for the same reason.

Qualified privilege

242 Google appeals against the Judge’s finding that the publication of the paragraphs was not on an occasion of statutory qualified privilege. Google contends that, contrary to the Judge’s finding, its conduct was reasonable and that the persons to whom the paragraphs were published had an interest in their subject matter.

243 For the reasons which I give below there is a great degree of overlap between the interests recognised by the common law of defamation and the interest recognised by s 28 of the *Defamation Act 2005* (SA). It is convenient therefore to commence with a consideration of the nature of the interests recognised by the common law.

244 The common law defence of qualified privilege was classically stated by Higgins J in *Howe v Lees*¹²⁷ (*Howe*):

[T]he word ‘interest’, as used in the cases, is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is ‘interested’ in knowing a fact – not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news.

245 There are two traditionally formulated categories of an occasion of qualified privilege.

246 There are some subject matters on which the public as a whole has an interest in being informed such that communications to the world at large can be privileged. In Australia that is the case with respect to communications on

¹²⁷ (1910) 11 CLR 361 at 398.

government or political matters.¹²⁸ National sporting celebrities appear to be a subject of equal public importance which may attract a similarly wide privilege but there are limits.¹²⁹ The communications in question in this matter do not fall within those classes but their existence serves to illustrate, as the Judge observed, that the underlying rationale for the existence of the defence is public policy.¹³⁰ The definition of an occasion of qualified privilege by reference to ‘a legitimate interest’ in the making and receiving of the communication allows courts, using traditional common law methods, to determine the denotation of the word *interest* and, accordingly, the occasions on which freedom of communication will be given priority over the right of the individual to protection against loss of reputation.¹³¹

247 The common law, unlike the Defamation Act, requires a reciprocity of interest which has been described as a community of interest.¹³² In *Howe*, Griffiths CJ, with whom Barton J agreed, explained that the term *community of interest* extended to ‘any legitimate object for the exercise of human faculties pursued by several persons in association with one another’.¹³³ In the same case O’Connor J said of the ‘relevant interest’ that so long as it is ‘of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it, it will come within the rule’¹³⁴. More recently in *Papaconstuntinos v Holmes à Court*,¹³⁵ the High Court affirmed a wide approach to the identification of community interest.

248 In addition to establishing that the publication was made on an occasion of qualified privilege, a defendant must also establish that the defamatory matter fell within the scope of the occasion.

249 In *Bashford v Information Australia (Newsletters) Pty Ltd*¹³⁶ (*Bashford*) Kirby J who, with the plurality, affirmed the finding that the communication was privileged, described the necessary connection between the defamatory statement and the occasion as follows:¹³⁷

[193] Various judicial formulae have been propounded to mark out the boundaries of the protection given by the relevant privilege. In *Bellino v Australian Broadcasting Corporation*, the joint reasons suggested that the test was whether ‘those defamatory imputations ... are relevant to the privileged occasion’. In that case Brennan CJ was, if anything, more stringent. He did not consider that it was sufficient to decide whether the impugned

¹²⁸ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹²⁹ *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.

¹³⁰ *Duffy v Google Inc* (2015) 125 SASR 437 at [391].

¹³¹ *Aktas v Westpac Banking Corporation Ltd* (2010) 241 CLR 79 at [22] per French CJ, Gummow and Hayne JJ; *Cush v Dillon* (2011) 243 CLR 298 at [12] per French CJ, Crennan and Kiefel JJ.

¹³² *Howe v Lees* (1910) 11 CLR 361.

¹³³ *Howe v Lees* (1910) 11 CLR 361 at 369 per Griffiths CJ.

¹³⁴ *Howe v Lees* (1910) 11 CLR 361 at 377.

¹³⁵ (2012) 249 CLR 534.

¹³⁶ (2004) 218 CLR 366.

¹³⁷ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 435-436, [193]-[196].

imputations were 'unconnected with and irrelevant to the main statement', as Lord Dunedin had proposed in *Adam v Ward*. In Brennan CJ's view, it was necessary, in order to attract the protection, that 'the publication of the defamatory matter makes a contribution to the discussion of the subject of public interest'. A still further criterion of connection, apparently derived from Canadian formulations, was that applied by Sheller JA and Hodgson JA in the Court of Appeal. This asked whether the defamatory imputations were sufficiently 'germane and reasonably appropriate' to the publication on the matter of public interest that otherwise attracted the privilege.

- [194] All of these formulae are attempts to define the boundaries of a discussion that is truly within the scope of the matter of public interest, so as to exclude the introduction of extraneous, irrelevant or marginal and gratuitous imputations that unacceptably do harm to the reputation and honour of an individual. Scientific precision is impossible by the use of such formulae. In every case, a judgment is evoked. In some instances the titillating character of an irrelevant defamatory imputation in an otherwise justifiable context will be plain. But in other cases, the issue will be more debatable, as Callinan J has correctly recognised.
- [195] Care must be observed in taking too literally the test propounded by Brennan CJ in *Bellino*. Because, as Callinan J notes, a defamatory imputation, as such, will commonly make little contribution to a discussion of public interest if included in a mistaken report of court proceedings, too rigid an application of that criterion would be self-fulfilling. Every error that involved a defamatory imputation would be cast beyond the pale. This would effectively introduce into the defence of qualified privilege a strict or even absolute requirement of accuracy in reports of proceedings that has been a feature of the common law defence of protected reports but not, as such, of qualified privilege. This, in turn, could endanger free discussion on subject matters of public interest that qualified privilege protects for the welfare of society.
- [196] Does this mean, as the appellant argued, that to allow the defence of qualified privilege would fundamentally frustrate the policy inherent in the defence of fair protected reports? I think not. In order to secure the alternative defence of qualified privilege, it remains in each case for the publisher to demonstrate that the defamatory imputations are 'relevant to the privileged occasion'. It must be left to the common sense of judges (and, where they still decide such matters, juries) to evaluate in the particular case whether the defamatory imputation is 'relevant' or 'germane' to the occasion or not. It can be left to such decision-makers to navigate the course between the Scylla of extraneous affront and the Charybdis of unrealistic demands that all communications on matters of public interest be fastidiously checked so as to remove the slightest inaccuracies before publication. Whilst the principal disqualifying element for the defence of protected report has conventionally been a want of fairness (and accuracy), the disqualifying element in the case of the defence of qualified privilege has conventionally been different: the existence of malice and the lack of bona fides on the part of the publisher. These considerations are not present here.

(citations omitted)

250 The plurality judgment of Gleeson CJ, Hayne and Heydon JJ explained the connection between the defamatory statement and the occasion in this way:¹³⁸

[29] The matter of which the appellant complained had as its subject the use that persons other than the copyright owner might make of material safety data sheets. That subject was evidently connected to occupational health and safety. The particular parts of the matter published by the respondent which defamed the appellant related to that subject. The defamatory matter related to the subject because it, like the rest of the matter published, concerned the use that others might make of material safety data sheets. It said that to assert that there had been "successful[] prosecut[ion] for MSDS copyright infringement" had been held to be "false and misleading conduct". That the article wrongly identified the appellant as having published this assertion did not alter or reduce the connection between the privileged occasion and the defamatory matter.

[30] Communication of the statement, that to assert successful prosecution for MSDS copyright infringement had been held to be false and misleading conduct, fulfilled the reciprocal duties or interests of the parties in the communication of information about occupational health and safety.

251 Gummow J expressed some caution about an approach which identifies an occasion of qualified privilege by reference to an interest in the communication of non-defamatory matter and then asks whether the defamatory statement was relevant to it:¹³⁹

[134] However, the Court of Appeal differed as to whether that part of the article which contained the defamatory imputation was also the subject of qualified privilege. Hodgson JA, with whom Sheller JA agreed, upheld Davies AJ's decision that pars [32]-[38] of the article were relevant to the subject-matter of the privileged occasion. Rolfe AJA dissented on this point.

[135] It is clear that both the primary judge and the Court of Appeal proceeded on the assumption that it was first necessary to establish that the principal part of the article was published on an occasion of qualified privilege and only then to consider whether the defamatory imputation, although not contained within the principal part of the article, nevertheless, was relevant to it. In my view, such an approach requires caution. The defence of qualified privilege is a plea in confession and, as such, is predicated upon the existence of a defamatory imputation to which the privilege attaches. To speak of qualified privilege attaching to a non-defamatory statement is to ignore this fundamental characteristic. It follows that questions of relevance, in the sense in which that term was used by the judges below, will ordinarily only arise where two or more defamatory imputations are published on a single privileged occasion. In such circumstances, it will be necessary to determine whether each imputation falls within the umbrella of the applicable privilege or whether one of the imputations is not relevant and, therefore, not covered by the defence. In the present case, only one defamatory imputation has been found to have been conveyed. It is therefore necessary to consider

¹³⁸ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 379, [29]-[30].

¹³⁹ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 415-416, [134]-[135].

whether *that imputation* was made on an occasion giving rise to a defence of qualified privilege arising out of a reciprocal duty or interest.

(emphasis in original; citations omitted)

252 McHugh J focussed, as will shortly be seen, on whether there was a legitimate interest in the subject matter of the defamatory material.

253 Ultimately a question as to whether a statement is germane or relevant to the occasion is a question about the scope of the occasion.

254 In *Bashford* Kirby J addressed the importance of the adaptation of the common law of qualified privilege to changes in the form and technology allowing modern day contemporary publications:¹⁴⁰

[200] Secondly, the minority appear to overlook the large expansion and variety of publications in Australian society today, including on specialised subject matters of importance and benefit to society. Occupational health and safety is only one such subject matter. The common law of qualified privilege must adapt to such changes and also to the technologies that make them possible. This is a reason for reading some of the old cases with critical scrutiny. The exchange and expression of views upon such subject matters may attract the defence of qualified privilege given the reciprocity of interest and duty that such publications commonly involve for their particular audiences. To withdraw the defence, or to hold that it is lost because of a factual error, would seriously burden such publications and thus community discussion upon specialised subject matters that conduce greatly to the convenience and welfare of society. The position of such publications is separate and different from the case of the general or mass media.

255 Whether or not a statement is germane to a privileged occasion or is a subject matter of legitimate interest to the recipient, should not be conflated with the question of malice. Nor does the law attempt to moderate the tone of statements in which there is a legitimate interest by reference to notions of proportionality.

256 In *Guise v Kouvelis*¹⁴¹ the shouted allegation ‘You are a crook’ by a committeeman to a visitor over his conduct in a game of cards was held not to be made on an occasion of privilege. The judgment of the majority proceeds on a narrow view of the common interest of members of a club which was said to be being informed of allegations of dishonest behaviour on the part of frequent visitors to that club. Latham CJ accepted that the presence of non-members in the club at a time a statement within the interests of members is made, does not destroy the privilege. He accepted too that visitors on the particular occasion had an interest in the plaintiff’s character, or at least that their presence did not exclude the possibility of the occasion being privileged.¹⁴² However Latham CJ

¹⁴⁰ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 437, [200].

¹⁴¹ (1947) 74 CLR 102

¹⁴² *Guise v Kouvelis* (1947) 74 CLR 102 at 111.

rejected the contention that shouting out the statement in a room of the club premises was a proper forum for the communication of the information of interest, holding that only a communication to the committee would constitute an occasion of privilege. Latham CJ said:¹⁴³

I can see no justification for holding that the interests of the defendant or of the members of the club or any social or other duty fairly warranted the public statement which was actually made.

Latham CJ excluded from occasions of privilege communications to ‘members of the club in general’.

257 McTiernan and Williams JJ agreed with the reasons of Latham CJ. Starke J also took the view that the making of the statement to a room of 50 or 60 persons who had no interest in the particular game in which the plaintiff was engaged, was not an occasion of privilege because ‘no reasonable right-minded man in the circumstances and in the position of the respondent ought ... to have made it’.¹⁴⁴

258 The decision of the majority in its practical effect places constraints of propriety and moderation on exchanges between club members but does so through the medium of a narrow construction of the occasion of qualified privilege. The majority held that the duty to make the charge, was limited to making it to the governing committee which, presumably, could then be trusted to deal with it in a proper way. The majority did not limit statements which are made on an occasion of qualified privilege to those which are appropriately moderate or proportionate.

259 Dixon J, in dissent, identified that the critical question was whether the circumstances gave rise to an occasion of privilege because that defence was excluded from the jury’s consideration. Dixon J continued:¹⁴⁵

In deciding this question, we should not, I think, allow ourselves to be affected by the canons of social conduct and the standards of discretion and restraint in such matters which we may suppose to be accepted in graver and more sedate, if not more select, bodies than the Hellenic Club. I do not mean that it is a matter to be treated according to Greek usage and custom, even if we knew what they demand. But we should recognize that in such matters conceptions of social duty or of interest and of propriety of conduct are not uniform.

260 Dixon J identified the occasion as being one in which a committeeman is watching a card game between a frequenter of the club and other members and the committeeman believes the frequenter of the club to be playing cards dishonestly. On such an occasion the committeeman has an interest in speaking out and is thereby protected by qualified privilege. Dixon J concluded:¹⁴⁶

¹⁴³ *Guise v Kouvelis* (1947) 74 CLR 102 at 112.

¹⁴⁴ *Guise v Kouvelis* (1947) 74 CLR 102 at 164.

¹⁴⁵ *Guise v Kouvelis* (1947) 74 CLR 102 at 120.

¹⁴⁶ *Guise v Kouvelis* (1947) 74 CLR 102 at 122.

The test of privilege that is in point is the defendant's interest or social duty in impugning then and there the plaintiff's play on the footing of what he had witnessed and on the other side the plaintiff's interest therein, which can hardly be doubted. The question and the interest of the bystanders is by no means immaterial, because it affects the extent of the protection, the extent of publication protected. But that is not the essential basis of the privilege, it is rather incidental.

261 In the following passage Dixon J distinguished between the question of what is an occasion of privilege and whether or not the words are spoken with malice:¹⁴⁷

The primary question for the Court is whether the occasion is privileged. If the occasion is privileged other questions may arise and it is possible that they may be, or comprise, matters of law for the Court [sic] though it is more likely that they will be questions of fact for the jury. The question whether the defamatory matter is or may be relevant to the occasion may arise in a form which the Court must decide. But it is for the jury to say under the issue of malice with what purpose the defamatory matter was published. That is to say whether the occasion was used for the purpose of the privilege is a matter for the jury; and since upon this issue the burden is upon the plaintiff, a question of the sufficiency of evidence to sustain the issue, which, of course, is one for the Court, is a question whether the plaintiff has displaced, not whether the defendant has established, privilege for the communication. Whether or not the occasion gives a privilege is a question of law for the judge, but whether the party has fairly and properly conducted himself in the exercise of it is a question for the jury: per Lord Campbell C.J. in *Dickson v. Earl of Wilton*. 'A confusion is often made between a privileged communication and a privileged occasion. It is for the jury to say whether a communication was privileged; but the question whether an occasion was privileged is for the judge' per Lopes L.J. in *Pullman v. Walter Hill & Co. Ltd*. 'If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason ... I apprehend the moment the judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff': per Brett L.J. in *Clark v. Molyneux*.

(citations omitted)

262 The plurality judgment in *Bashford* made the same point in this way:¹⁴⁸

[22] Qualified privilege gives no licence to defame. It denies the inference of malice that ordinarily follows from showing that false and injurious words have been published. If the occasion is privileged the further question which arises is whether the defendant "has fairly and properly conducted himself in the exercise of it". In a trial of all issues in a defamation action by judge and jury, the question whether the occasion is privileged is a question of law for the judge; the question whether the occasion was used for the purpose of the privilege is a question of fact for the jury. That is, it is for the jury in such a trial to decide the issue of malice. If the judge rules that the occasion is privileged, "the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is

¹⁴⁷ *Guise v Kouvelis* (1947) 74 CLR 102 at 117.

¹⁴⁸ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366, 377 at [22] per Gleeson CJ, Hayne and Heydon JJ.

thrown upon the plaintiff¹⁴⁹. But if the occasion is held to have been privileged, the question of malice will ordinarily remain to be answered. If that is so, it cannot be said that the defendant had some licence to defame.

(citations omitted)

263 The Judge rejected Google's defence of common law qualified privilege for the following reasons:¹⁴⁹

[400] In the present case, Google published the defamatory words to anyone who chose to use its search engine to search for Dr Duffy's name. Google's publication was indiscriminate as to the persons to whom publication might be made and as to the purpose or interest of such persons in making the search enquiry. While some recipients may have had a legitimate interest in ascertaining specific types of information about Dr Duffy amounting to a sufficient interest for the purpose of qualified privilege, the information provided by Google about Dr Duffy was not confined to any specific type of information nor tailored to the particular interest of such a recipient. Google made the information available to any recipient enquiring out of mere curiosity or for purposes of gossip or worse.

264 The publication of snippets by Google was, as the Judge observed, an indiscriminate publication to anyone who chose to search the relevant terms on Google's search engine but it was not a publication to the world at large. The Judge correctly observed that Google had made the information about Dr Duffy *available* to any recipient enquiring out of mere curiosity but the Judge made no finding that it was actually published to a person with no greater interest than curiosity or gossip.

265 In *Lazarus v Deutsche Lufthansa AG*¹⁵⁰ Hunt J explained why proof of identity is not necessary in the case of newspaper and television audience.¹⁵¹ Publication to the 'world at large'¹⁵² allows an inference of publication to persons with no special or particular interest in the subject matter. Publication is presumed in the case of a book, newspaper or television broadcast.¹⁵³ In the case of publication through the mass media, publication to a wider audience than those persons who, for one reason or another, may have an interest within the common law or statutory meaning of that word, can readily be inferred. A plaintiff is entitled to rely on 'width or the unrestricted nature of the publication', not upon the precise identity of the persons to whom it was made'.¹⁵⁴ For that reason the common law defence of qualified privilege has but very limited application to publications by the mass media.

¹⁴⁹ *Duffy v Google Inc* (2015) 125 SASR 437 at [400].

¹⁵⁰ (1985) 1 NSWLR 188 at 192-194.

¹⁵¹ *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 at 192-193.

¹⁵² *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 291 per Starke J; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 260-261 per McHugh J.

¹⁵³ Neill B and Rampton R, *Duncan and Neill on Defamation*, 2nd Ed, Butterworths, 1983 at [8.02].

¹⁵⁴ *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 at 192-193 per Hunt J.

266 There is a critical distinction between the World Wide Web and the mass media for the purposes of identifying the audience. Newspapers and television broadcasts are read or viewed by persons with a wide range of interests who may wish to receive information on one subject but, because of the way in which a newspaper is read and the television watched, inevitably receive information on many other subjects. They do not in any real sense request that information. It is impossible therefore to infer that every member of the audience of a mass media publication has a particular interest in the subject matter of the defamation.

267 The decision of the High Court in *Bashford* provides guidance on what may be a legitimate interest in cases in which information is published, not at large, but to persons who request information of a particular kind. In *Bashford* the question was whether defamatory material communicated through a newsletter published by subscription to a trade industry group was published on an occasion of qualified privilege. Trade newsletters bear some broad analogy to the use of internet search engines in that, by reason of the subscription, there is a request for information on a particular subject matter. As is commonly the case the analogy is imperfect because the broad terms in which an enquiry might be made of a search engine will often not reveal the particular subject matter in which the enquirer may have an interest.

268 Be that as it may, in *Bashford* the defendant/respondent (Information Australia) was the publisher of a newsletter which was restricted to subscribers who were professionally interested in the subject matter of occupational health. Mr Bashford brought an action in defamation against Information Australia who had published a report of another proceeding stating that Mr Bashford was found to have engaged in false and misleading conduct. The proceedings reported were brought by ACOHS Pty Ltd in the Federal Court against RA Bashford Consulting Pty Ltd and others for misleading and deceptive conduct in publishing an article which stated that ACOHS had been successfully sued by a competitor for improper use of material safety data sheets in earlier proceedings. The Federal Court gave judgment for ACOHS and dismissed a cross-claim brought by another of the defendants alleging that ACOHS had breached his copyright in the data sheets. Information Australia published a report of those second proceedings but incorrectly stated that Mr Bashford himself was found to have engaged in false and misleading conduct. Mr Bashford in turn brought an action in defamation against Information Australia. Mr Bashford's claim was dismissed in the Supreme Court of New South Wales as well as in the Court of Appeal on the grounds that the defamation was published on an occasion of qualified privilege and, albeit mistaken, the report that Mr Bashford himself had been found guilty to have engaged in misleading and deceptive conduct, was sufficiently connected with the report of the dismissal of the other publisher's cross-claim to fall within the occasion of qualified privilege.

269 Gleeson CJ, Hayne and Heydon JJ (the plurality judgment) upheld the decision of the Supreme Court of New South Wales. The plurality judgment:

- applied the statement of Parke B in *Toogood v Spyring*¹⁵⁵ that malice is presumed of a defamatory statement unless it is fairly warranted by a reasonable occasion or exigency constituted by a fair and honest discharge of a public or private, legal or moral duty or reciprocal interest.¹⁵⁶
- confirmed that the catalogue of such occasions is not closed.¹⁵⁷
- found that the subject matter - workplace health and safety - is important to society as a whole and the subject matter of the particular publication complained of was 'the use which persons other than the copyright owner might make of material safety data sheets'.¹⁵⁸
- held that the commercial nature of the publication did not deny its publication the status of an occasion of qualified privilege, if that were otherwise made out, bearing in mind that its primary purpose was to publish information about workplace safety and not the personal character of individuals.
- emphasised in upholding the claim to privilege that the bulletin was published only to those responsible for occupational health and safety and it dealt only with those matters.

270 The strong dissenting judgment of McHugh J opened with the following paragraphs:¹⁵⁹

[36] 'When *New York Times Co v Sullivan* was decided, Alexander Meiklejohn, the philosopher of free speech, said it was 'an occasion for dancing in the streets'. So wrote Anthony Lewis, the legal columnist for the *New York Times*, in his book *Make No Law: The Sullivan Case and the First Amendment*. Australia has no First Amendment to celebrate. But, as it appears to me, the majority decision in this case goes beyond any decision that could be rendered under the First Amendment. It may not cause any dancing in the streets, but it is likely to be celebrated in the offices of the publishers of subscription magazines dealing exclusively with subjects of public interest and it will almost certainly be celebrated beyond that newly privileged group of publishers.

[37] The majority decision holds that an occasion of qualified privilege arises when matter is voluntarily published to subscribers concerning a subject of public interest, if the subscribers have a business or professional responsibility for that subject. If they have that responsibility, the occasion is privileged even where, as here, the subject matter is described at a high level of abstraction — 'occupational health and safety' or a 'guide to workplace health and safety'. It is possible to imagine more abstract statements of a subject of public interest, but there is certainly nothing concrete in the description of the subject matter in this case.

¹⁵⁵ (1834) 1 Cr M & R 181 at 193.

¹⁵⁶ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373, [9].

¹⁵⁷ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373, [10].

¹⁵⁸ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 377-378, [24].

¹⁵⁹ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 380-381, [36]-[38].

Thus, the majority decision appears to protect the extensive publication of defamatory statements, true or false, that can be related to a widely defined subject of public interest when they are published to persons who have some responsibility for matters falling within the subject of interest.

- [38] At least inferentially, the majority decision also holds that the occasion is privileged even though the defamatory matter is not itself part of the subject of public interest and no part of that subject contains defamatory matter. Necessarily involved in the majority decision, given the facts of the case, is the holding that qualified privilege protects defamatory matter even though it is merely explanatory of, or related or incidental to, the subject of public interest and would not be published on an occasion of qualified privilege if published by itself. Indeed, the judgment of the Court of Appeal, which the majority decision affirms, expressly held that it was sufficient that the defamatory matter was explanatory of the subject of public interest. Nor did it matter, in the Court of Appeal's view, that the defamatory matter would not be published on an occasion of qualified privilege if published by itself. The majority decision also appears to treat the publication of the subscription magazine itself, and not the publication of the article that gave rise to the defamation, as the occasion of qualified privilege.

(citations omitted)

271 Those dissenting remarks emphasise that the majority decision in *Bashford* took a wide approach to the scope of an occasion of qualified privilege, and the importance the majority placed on the extent to which the publication was addressed, and responded to, the information needs of a limited audience.

272 McHugh J observed that in determining whether or not an occasion is privileged, a court will examine the nature of the defamatory communication, the position of the publisher, the number of recipients and the nature of their interest in receiving the information and the time, place and manner of, and reason for, the publication.¹⁶⁰ McHugh J emphasised that references in the authorities to qualified privilege serving 'the common convenience and welfare of society' are not the legal determinants of the existence of the privilege but state the beneficial policy consequence of allowing, in particular circumstances, such a privilege. McHugh J explained:¹⁶¹

- [58] With respect, this analysis of the issues turns the law of qualified privilege on its head. A plea that defamatory matter was published on an occasion of qualified privilege is a plea of confession and avoidance. It accepts that the communication is defamatory, that the defamatory matter may be false and that its publication has caused or may cause harm to the plaintiff. It confesses the publication of defamatory matter, but contends that the publication is immune from liability because the public interest requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation. The court cannot determine these issues of duty and interest without characterising the subject matter of the defamation. It cannot judge whether the particular duty and interest are so necessary for the proper functioning of society that the occasion

¹⁶⁰ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 386, [54].

¹⁶¹ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 387-388, [58]. See also [59]-[63].

should be privileged — despite the harm that the communication may cause — unless it knows what is the nature of the defamatory communication that allegedly gives rise to the duty and interest. A defendant who claims that the occasion was privileged must show that ‘both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter’ such that public policy requires that the defendant be immune from liability for the publication.

273 The point made by McHugh J in that passage is that it is in the nature of the defence of qualified privilege that the defendant, in effect, confesses the defamatory statement and pleads that that statement itself was published on an occasion of qualified privilege. That the defence of qualified privilege is a plea of confession and avoidance does not support the conclusion that the defendant must identify the particular person to whom the defamation was published in order to prove an interest in its subject matter which attracts the privilege. On the contrary before there can be any ‘confession’ of publication the plaintiff must prove to whom the publication was made precisely because only then can a defendant be in a position to confess a communication so that the nature of the occasion on which it was made can be examined. It follows that the persons who made the enquiries, must be proved by the plaintiff, if not individually, at least by class. McHugh J continued:¹⁶²

[60] Although it is convenient for text book writers and sometimes judges to classify occasions of qualified privilege into broad categories such as replies to attacks and interests arising out of employment, the practical working of the doctrine of qualified privilege requires that the occasion be defined concretely and precisely. That ordinarily requires the interest of the recipient to be defined first, and to be defined concretely and precisely, although sometimes it is necessary first to define the duty in that way. Unless the interest is so defined, the issues of duty, occasion, relevance and malice cannot be determined — at all events correctly.

This passage shows that the focus in determining whether there was an occasion of qualified privilege must be on the interest of the particular recipient(s).

274 McHugh J recognised that the common law adopts a more liberal approach to the question of duty and interest to statements replying to a request for information.¹⁶³ McHugh J surveyed those cases in which an employer seeks information about a prospective employee from a former employer. A generally liberal approach to identifying an occasion of qualified privilege was taken in those cases even though the information sought dealt directly with the character of the prospective employee.¹⁶⁴

¹⁶² *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 388, [60].

¹⁶³ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 390, [65].

¹⁶⁴ McHugh J also said:

A common case of a moral or social duty in this context is the duty to answer a request by a potential employer for information concerning the character, capacity or honesty of an employee. When such a request is made, the common law recognises a duty in the recipient of the request to answer the inquiry and to state fully and honestly all that he or she believes that he or she knows about the employee that is relevant to the inquiry. The answer cannot be used as a licence to defame the

275 McHugh J concluded:¹⁶⁵

[71] But not every relevant answer to a request for information concerning the character, reputation or credit-worthiness of another is published on an occasion of qualified privilege. The occasion will not be privileged unless the person making the inquiry has a legitimate interest in obtaining the information. Interest for this purpose — and the law of qualified privilege generally — means more than an interest in the information ‘as a matter of gossip or curiosity’. The interest must be a social, moral or economic interest that is sufficiently tangible for the public interest to require its protection. The interest of the recipient, said Evatt J in *Telegraph Newspaper Co Ltd v Bedford*, must be ‘a real and direct personal, trade, business or social concern’. The occasion will not be privileged simply because the defendant believes that the recipient had a relevant interest in receiving or duty to receive the communication.

(citations omitted)

276 The difficulty in this case is that the substantial publication found by the Judge was to unidentified persons. As I have earlier observed, the Judge never expressly quantified what he described as substantial publication in his reasons on liability, but for the reasons I have given in [66] and elsewhere above, the defamatory material was published to a relatively small number of the Australian community. The publication was to a much smaller group than the audience of most newspapers, magazines and television broadcasts.

277 Because the Judge inferred publications to persons other than Ms Palumbo from data generated by the AdWord website and the Google data, the circumstantial basis for the finding of publication does not allow a precise identification of those persons, or, therefore, their reasons for searching, and their interest in the subject matter of the results. The finding of publication, although factually sound, forms a problematic basis for the consideration of the defences of qualified common law and statutory privilege. Those defences require proof by the defendant of the recipient’s interest in receiving the defamatory material. In the ordinary case of publication other than through the mass media, the identity of the persons or class of persons to whom the material was communicated is proved by direct evidence as part of the plaintiff’s case. It is that proven publication which a defendant ‘confesses’ and on which it mounts its case as to privilege.

278 Google faced an obvious difficulty in putting its qualified privilege defence precisely for that reason. Here a nice question as to the onus of proof arises. Must Google prove the identity of the persons or classes of persons to whom Dr Duffy has circumstantially, and therefore inscrutably, proved publication, so that it can then prove that they had a relevant interest? Or does Dr Duffy carry

employee. It must be fairly and reasonably relevant to the inquiry. If the employer is asked whether the employee is fit to be employed as a gardener, it is unlikely that the occasion of privilege would extend to details about the employee’s convictions for negligent driving. *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [69].

¹⁶⁵ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [71].

the onus of proving the persons or classes of persons to whom the paragraphs and the Ripoff Reports were published, or must she at least show publication to some persons to whom Google cannot attribute a relevant interest. The latter must be the case because no issue as to the defence of qualified privilege can arise until publication is proved by the plaintiff. The onus on a defendant who relies on the defence of qualified privilege is to prove the circumstances that render the publication, which has been proved by the plaintiff, an occasion of qualified privilege. The defendant is not called on to prove the much wider, negative, proposition that material was not published to anyone who did not have an interest in receiving.

279 A defendant would face substantial forensic unfairness if it were burdened with the onus of proving the identity of the persons to whom the search paragraphs were published when the circumstantial proof of publication is nebulous. Quite apart from the practical difficulty of procuring the necessary evidence a defendant would be placed in the position of adding to the plaintiff's case on the element of publication in order to provide a foundation for the defence of qualified privilege.

280 In an analogous case of publication by a newspaper in which the plaintiff relies on legal innuendo, the plaintiff must prove publication to a person with the necessary extrinsic knowledge.¹⁶⁶ Placing the onus of proof on the plaintiff is also consistent with the practice of ordering particulars of the identity of the audience to whom the plaintiff alleges the defamatory material was published so that a defendant can plead any defence, including qualified privilege, to which the membership of the audience is relevant.

281 It is necessary therefore to return to the issue of publication in order to identify the persons to whom the plaintiff has proved publication and to determine whether they had an interest in the subject matter of the published paragraphs and the Ripoff reports.

282 A searcher who enters a person's name into an internet search engine in effect asks 'what information is there about this person in your data base'. Plainly the mere making of an enquiry does not establish that the enquirer has a legitimate interest in the subject matter of each and every answer which is given in response. Idle gossip is propagated both by volunteering as well as fishing for information. The subject matter of the enquiry must be a matter in which the receiver has an interest of a kind which is a legitimate object of social, commercial or political discourse.

283 In the case of internet searches identifying the subject matter of the enquiry may be problematic because of the economy of terms which can be entered for a successful search. The success or the failure of the defence of qualified privilege

¹⁶⁶ *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 3 All ER 32, CA at 37, 39; *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 89, 91.

will be quite arbitrary if whether an occasion is privileged or not depends on whether or not a legitimate subject is disclosed by the terms of the search request. The success or failure of the defence should not be determined by whether a person with a legitimate interest in the information has made a short hand or extensive enquiry of the search engine. It is necessary therefore to look beyond the search term and consider the relevant interest of the person making the search in the defamatory material which is provided in the response.

284 There are two broad classes of persons who are likely to have searched for Dr Duffy on the internet. The first are those who were in, or were considering entering into, a professional, commercial, employment or personal association with her. I would find that Google did publish the search results to a significant number of persons in that class. Persons who searched the internet for information about Dr Duffy for the purpose of furthering, or limiting, relationships of that kind were engaging in a now commonplace form of investigation. It is a notorious fact that very many people regularly search or 'google' for useful information about persons with whom they are likely to engage in one way or another. The law should accept that enquiries of those kinds serve a useful social purpose. A narrow view should be taken of the pursuit of a duty of interest.¹⁶⁷

285 However, not all of information on the internet may be of legitimate interest to persons who are in, or are contemplating, a relationship of one kind or another with Dr Duffy. Searches may be made for information in which the enquirer has a relevant interest but the search engine, because of its very nature, will provide search results relating to other matters, including defamatory statements, which can have no bearing on the interests of the enquirers.

286 The extraneous matter maybe published to the recipient in the course of giving to him or her information on the subject matter in which he or she has an interest, or apparent interest, in the sense that it is contemporaneous, and because it is in the inherent nature of the internet search process to provide all of that information. However, the question remains whether it is germane to, or falls within the scope of, the occasion of qualified privilege. To adopt the approach of McHugh J in *Bashford*, the question is whether the subject matter of the defamatory statement is of legitimate interest to the enquirer.

287 In the course of submissions, counsel for Dr Duffy posed, as an example, an enquiry about a particular subject matter which elicits scandalous information about a well-known person who is prominently associated with that subject matter. The subject matter of that information may be of legitimate interest to some enquirers but be no more than titillating gossip for others.

288 In this case there is no such difficulty. The subject of the defamatory statements is Dr Duffy's conduct in her on-line dispute with internet psychics.

¹⁶⁷ *Cush v Dillon* (2011) 243 CLR 298 per French CJ, Crennan and Kiefel JJ.

The defamatory statements are not narrative second-hand accounts of conduct in which Dr Duffy engaged or is alleged to have engaged. The defamatory paragraphs were published in the course of providing information about the controversy generated by Dr Duffy's posts. They are statements made in the course, and as part, of a debate which Dr Duffy initiated and continued to engage in.

289 The first class of persons conducting searches are those who are in, or considering, a professional, commercial, employment or personal engagement with Dr Duffy have a proper interest in that subject matter. It may legitimately affect their decisions about whether to continue with, or to have a relationship with Dr Duffy, and the terms on which that engagement with her might take place.

290 The second identifiable class of persons comprises those persons who use internet psychics or who support or are critical of them, and who for any of those reasons are therefore interested in the controversy between Dr Duffy and the psychics' supporters. Persons in that class plainly had an interest in the subject matter of the defamatory paragraphs and the Ripoff Reports. I do not regard the fact that the searches were made some time after Dr Duffy engaged in the debate with the psychics to contradict my finding. Historical material is often searched for. It is difficult to account for the number of searches if that were not the case.

291 The fact that persons in those classes read the impugned paragraphs after deciding to conduct an on-line search of Dr Duffy, rather than merely accessing material that had been published 'to the world at large', supports the conclusion that they had an interest in the material. Indeed, in order to first execute a search a searcher has to have the specific knowledge of Dr Duffy's name in their mind and take the requisite steps in order to execute the search and find out more about her.

292 It is plain that any person who searched Dr Duffy's name, even though they did not contemplate having any dealings with her, and who had no interest in her controversy with psychics, had no interest in receiving the defamatory material about her on-line campaign against psychics. It is possible that some people aimlessly searched Dr Duffy's name and read the paragraphs and followed hyperlinks to the Ripoff Report. I also accept that there are some persons who engage in purposeless internet surfing. One or more of those persons may, possibly by chance, have stumbled on the paragraphs of the search results of which Dr Duffy complains. Further, it is possible that someone searched her name in the hope of unearthing some, hopefully scandalous, gossip about her. But the evidence did not disclose any reason to suspect that any of those people existed. Moreover, it is difficult to imagine a person who would search for that reason but who would still not have a legitimate interest in the learning of campaign Dr Duffy waged against the psychics. I also accept that persons

conducting purposeful searches sometimes stumble across other information extraneous to their search which they then read.

293 However, there were, as I have earlier found, relatively very few searchers of Dr Duffy's name. The small number of searchers is easily accounted for by searchers who fall within one or other of the classes I have identified with a legitimate interest in the subject matter of Dr Duffy's on-line debate with the psychics. The possibility that a completely disinterested person read the impugned paragraphs is purely speculative. It is not possible on the evidence to find that a relevant search was undertaken by a person who did not fall into one of the two postulated classes. Indeed even if the onus is properly on Google to prove that it was not published to a person with no relevant interest, who, as it were, accidentally, came across the impugned paragraphs, I would so find.

294 I return to Ms Palumbo's interest. Her interest in the subject matter of the Google paragraphs arose initially from Dr Duffy's recommendation that she read certain articles on which she had collaborated with others, to help her give up smoking. In so searching, Ms Palumbo had a legitimate interest in knowing how Dr Duffy had conducted herself in her online debate with the physics. Such conduct would inform Ms Palumbo's ability to evaluate Dr Duffy's recommendations. Thereafter her interest in the subject matter of the paragraphs was in following whether or not Google had blocked the offending web pages.

295 I next turn to the legislatively modified concept of qualified privilege and to the nature of the interests which attract qualified privilege.

296 Section 28 of the *Defamation Act 2005* (SA) provides:

28—Defence of qualified privilege for provision of certain information

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the *recipient*) if the defendant proves that—
 - (a) the recipient has an interest or apparent interest in having information on some subject; and
 - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—

- (a) the extent to which the matter published is of public interest; and
 - (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
 - (c) the seriousness of any defamatory imputation carried by the matter published; and
 - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
 - (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
 - (f) the nature of the business environment in which the defendant operates; and
 - (g) the sources of the information in the matter published and the integrity of those sources; and
 - (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
 - (i) any other steps taken to verify the information in the matter published; and
 - (j) any other circumstances that the court considers relevant.
- (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
- (5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

297 It is clear from both the terms of s 28 of the *Defamation Act 2005* (SA) and the construction given to earlier statutory analogues interstate that it was intended to enlarge the nature of the 'interest' beyond that required to satisfy the defence at common law. That purpose was expressly adverted to by the Attorney-General in the Second Reading Speech.¹⁶⁸

¹⁶⁸ South Australian Parliamentary Debates, House of Assembly, 2 March 2005, (Michael Atkinson, Attorney-General) at 1839; the defence is broader than the defence at general law because the interest that the recipient must have or apparently have is not as limited as at general law. It has been said of the New South Wales provision that '[w]hat the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles of privilege require to be established'. See *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 797.

The proposed section, however, adds to the factors referred to in the New South Wales provision in two important respects. Firstly, it requires the court to take into account whether it was in the public interest in the circumstances for the matter published to be published expeditiously. The New South Wales provision limits the court to consideration of whether it was necessary in the circumstances for the matter published to be published expeditiously. Secondly, it requires a court to take into account the nature of the business environment in which the defendant operates. The New South Wales provision does not include this factor in its list of factors.

298 The New South Wales Court of Appeal in *Morosi v Mirror Newspapers Ltd* explained that s 22(1)(a) of the *Defamation Act (NSW)* enlarged qualified privilege generally, in particular but with respect to mass media publications qualified privilege was enlarged by removing the need to show a duty to public or a reciprocity of interest shared by the publisher as follows:¹⁶⁹

The limited application of the common law principles of qualified privilege to publication in newspapers has already been discussed. Section 22 was designed to enlarge the protection afforded by these principles to defamatory publications generally, and it has a particular relevance to publications and newspapers; but it gives no carte blanche to newspapers to publish defamatory matter because the public has an interest in receiving information on the relevant subject. What the section does is to substitute reasonableness in circumstances for the duty or interest which the common law principles of privilege require to be established.

299 In *Austin v Mirror Newspapers Ltd*,¹⁷⁰ the Privy Council affirmed the wide approach given to the meaning of interest under the *Defamation Act (NSW)* by the Supreme Court of New South Wales:

[I]t is possible as a matter of construction to place a narrow or a broad construction on the words 'an interest'. The narrow construction would equate 'an interest' with that type of interest which is usually looked for as an ingredient of the defence of qualified privilege at common law, that is to say, an interest material to the affairs of the recipient of the information such as would for instance assist in the making of an important decision or the determining of a particular course of action. It is for this narrow construction of the plaintiff contends. But it is clear that the courts in New South Wales have placed a broader construction upon the words 'an interest' and have taken to include any matter of genuine interest to the readership of the newspaper. In *Wright v Australian Broadcasting Commission* when considering section 22(1)(a) in respect of a television broadcast:

'it cannot be denied that the recipient, in this case the general public, had an interest in having information on the subject of public affairs.'

(citations omitted)

300 In *Barbaro v Amalgamated Television Services Pty Ltd*,¹⁷¹ Hunt J described the nature of the interest protected by s 22(1)(a) of the *Defamation Act 1974 (NSW)*, which was in the same terms as section 28(1)(a) of the Act as follows:

The interest or apparent interest of the recipients need not be a proprietary one, nor even a pecuniary one: *Howe v Lees*. The word 'interest' is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news; *Andreyevich v Kosovich and Publicity Press*. The interest must be definite; it may be direct or indirect, but it must not be vague or insubstantial — so long as the interest is of so tangible a nature that it is expedient to protect it for the common convenience and welfare of society, it will come within the privilege afforded by the

¹⁶⁹ [1977] 2 NSWLR 749 at 797.

¹⁷⁰ [1986] AC 299 at 311.

¹⁷¹ (1985) 1 NSWLR 30 at 40.

section: *Howe v Lees* (at 377); *Andreyevich v Kosovich and Publicity Press (1938) Pty Ltd.*

(citations omitted)

301 It is to be noted that notwithstanding the broadening of the concept of interest under the statute described by the Court of Appeal in *Morosi* and the Privy Council in *Austin*, Hunt J has in that passage used terms to describe the nature of the interests which are broadly derived from the common law test. That is not as surprising as it first appears.

302 The concept of an interest for the purpose of both the statutory and common law defence is normative, reflecting an underlying community value about the subject matters which are a legitimate subject of socio-political discourse and are entitled to qualified privilege for that reason. Therefore there is necessarily a large degree of overlap. However, Hunt J does not expressly advert, as the Court of Appeal in *Morosi* did, to the material statutory expansion of the occasions of privilege by the removal of any requirement of duty or reciprocity of interest on the part of the provider of the information. That is because the passage deals only with the interest of the recipient. The requirement of an interest on the part of the publisher to publish has been legislatively replaced by the obligation on the disseminator to act reasonably, an element of which is the public interest in the information. It is the abrogation of the need for reciprocity which has expanded the scope of the statutory privilege.

303 Recently, in *Stone v Moore*,¹⁷² Doyle J observed:

[114] The intention of the statutory defence of qualified privilege is to broaden the nature of the interest which will found the defence relative to the common law. The focus is on the interest of the recipient rather than a reciprocity or community of interests. Again, the concept of interest is not to be narrowly or technically construed. It is used in the broader, popular sense of a matter of substance in which the relevant audience might legitimately have an interest in knowing, as long as that interest goes beyond being a matter of curiosity or prurient interest.

304 In *Morgan v John Fairfax & Sons Ltd (No 2)*,¹⁷³ (Morgan) Hunt A-JA surveyed the statements of principle on the reasonableness standard imposed on the statutory defence of qualified privilege by s 22 of the *Defamation Act (NSW)* and concluded:¹⁷⁴

In my opinion, all of those cases support the following propositions in relation to the requirement of s 22(1)(c) that the conduct of the defendant in publishing the matter was reasonable in the circumstances:

- (1) The conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter complained of. The

¹⁷² (2016) 125 SASR 81; [2016] SASCF 50 at [114] (Kourakis CJ and Stanley J agreeing).

¹⁷³ (1991) 23 NSWLR 374.

¹⁷⁴ *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374 at 387-388.

more serious the imputation conveyed, the greater the obligation upon the defendant to ensure that his conduct in relation to it was reasonable. Of course, if any other defence (such as truth or comment) has already been established in relation to any particular imputation found to have been so conveyed, it is unnecessary to consider the reasonableness of the defendant's conduct in relation to the publication of that particular imputation.

- (2) If the defendant intended to convey any imputation in fact conveyed, he must (subject to the exceptional case discussed in *Barbaro's* case, and perhaps also that discussed in *Collins v Ryan*) have believed in the truth of that imputation.
- (3) If the defendant did not intend to convey any particular imputation in fact conveyed, he must establish:
 - (a) that (subject to the same exceptions) he believed in the truth of each imputation which he did intend to convey; and
 - (b) that his conduct was nevertheless reasonable in the circumstances in relation to each imputation which he did not intend to convey but which was in fact conveyed.

If, for example, it were reasonably foreseeable that the matter complained of might convey the imputation which the jury finds was in fact conveyed, it will be relevant to the decision concerning s 22(1)(c) as to whether the defendant gave any consideration to the possibility that the matter complained of would be understood as conveying such an imputation, as will be his belief in the truth of that particular imputation and what steps he took to prevent the matter complained of being so understood: *Evatt v John Fairfax & Sons Ltd*; *Makim v John Fairfax & Sons Ltd*; see also *Wright v Australian Broadcasting Commission* (whether the defendant 'knew whether he was likely to convey a misleading impression'); *Austin v Mirror Newspapers Ltd* (Privy Council).

- (4) The defendant must also establish:
 - (a) that, before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right, (where appropriate) by making proper inquiries and checking on the accuracy of his sources;
 - (b) that his conclusion (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained;
 - (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
 - (d) that each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers.

The extent to which the inquiries referred to in par (4)(a) should have been made will depend upon the circumstances of the case, in particular the nature and the source of the information which the defendant has obtained, and whether the position, standing, character and opportunities of knowledge of the informant (as perceived by the defendant himself) are such as to make his belief in the truth of that information a reasonable one: cf *South Suburban Co-operative Society Ltd v Orum*; *White & Co v Credit Reform Association & Credit Index Ltd*; see, also, *Hansen v Border Morning Mail Pty Ltd*. It is necessary to keep in mind that each of the matters referred to in par (4) are relevant to the

reasonableness of the defendant's conduct; they do not raise questions independently of that issue. This is important in relation to the functions of judge and jury. If, for example, there is a dispute as to whether the defendant made a particular inquiry, that dispute is to be decided by the jury. But if there is a dispute as to whether reasonable conduct in the circumstances required inquiries to be made or as to whether the inquiries in fact made were sufficient, those disputes are to be decided by the judge as part of the ultimate question as to whether the defendant's conduct was reasonable in the circumstances.

Bearing in mind the precept of the Privy Council in *Austin v Mirror Newspapers Ltd* that it would be impossible to give any comprehensive definition of what conduct will be held to be reasonable in the circumstances, and that it would be most unwise to attempt to do so, the above propositions do not purport to be exhaustive.

I have, I feel, said sufficient to demonstrate that knowledge of which imputations were in fact conveyed *is* necessary to enable both the judge to determine whether the defence of statutory qualified privilege succeeds and also, to a more limited extent, the jury to determine some of the issues of fact upon which the judge's ultimate decision will depend if those issues are in dispute.

(emphasis in original; citations omitted)

305 The Judge rejected Google's defence of statutory qualified privilege because members of the public as a whole had no interest in communication of the information in the impugned paragraphs:¹⁷⁵

[403] The word 'interest' in section 28(1)(a) applies not only to the interest of a particular class of recipients but also to the interest of the public at large when it is in the public interest that the information be communicated to the public. The reference to 'interest' in section 28 is therefore broader than the category of communication to a limited class having an interest in receiving the communication referred to at [391] above.

[404] In *Barbaro v Amalgamated Television Services Pty Ltd*, Hunt J said of section 22(1)(a) of the *Defamation Act 1974* (NSW) which was in the same terms as section 28(1)(a) of the Act:

The interest or apparent interest of the recipients need not be a proprietary one, nor even a pecuniary one. The word 'interest' is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news. The interest must be definite; it may be direct or indirect, but it must not be vague or insubstantial — so long as the interest is of so tangible a nature that it is expedient to protect it for the common convenience and welfare of society, it will come within the privilege afforded by the section.

[405] This passage has been approved by the New South Wales Court of Appeal more recently in *Echo Publications Pty Ltd v Tucker & Ors*; *Fast Buck\$ v Tucker & Anor* (No 3) and *Griffith v Australian Broadcasting Corporation*.

[406] Google published the defamatory words indiscriminately to anyone who wanted to search for references on the web to Dr Duffy regardless of the person's purpose or

¹⁷⁵ *Duffy v Google Inc* (2015) 125 SASR 437 at [403]-[408].

interest: it may have been simply a matter of curiosity or otherwise not a matter of substance apart from its mere quality as news. The requirement that the recipients had an interest in having information on the subject is not satisfied.

[407] Google contends that there is a public interest in the efficient availability of material on the web and in particular through the use of search engines. Whether or not that be so, a member of the public does not have an 'interest' within the meaning of section 28(1)(a) in information on the web because it is on the web any more than a member of the public has an interest in reading information in a newspaper because it is in a newspaper.

[408] For the same reasons, the alternative requirement that the recipients had an apparent interest is not satisfied.

(citations omitted)

306 The analogy made by the Judge between Google's search engine and newspapers is not a valid one. This is not a case of a mass media publication in which it may be inferred that persons with no more than idle curiosity read the defamatory material, but one in which the information communicated is tailored and exclusive to particular request.

307 For the reasons I gave in [284]-[293] I would find that the persons who made the subject searches had a greater interest than idle curiosity and that they had a legitimate interest in the subject matter of the defamatory statement.

308 The Judge also rejected Google's contention that its conduct was reasonable:¹⁷⁶

[409] Subsection 28(3) of the Act provides a non-exhaustive list of circumstances that the court may take into account in determining whether the defendant's conduct was reasonable. They include the sources of the information in the matter published and the integrity of those sources and any other steps taken to verify the information in the matter published.

[410] Google published the material about Dr Duffy indiscriminately. It is only regarded as a publisher after it was notified of the defamatory material by Dr Duffy and refused to review or remove it. Its conduct is incapable of being characterised as reasonable in the circumstances.

309 As I earlier observed Google did not publish the information indiscriminately but only to the persons who made a particular search for information about Dr Duffy.

310 Internet search engines provide a tangible, indeed substantial, public benefit by providing references and links to the mass of material and information sought by the public to help them in their daily social, professional and commercial lives. It is a truism that the exchange of information has always been, and remains, the driving force of human progress. It is notorious that the World

¹⁷⁶ *Duffy v Google Inc* (2015) 125 SASR 437 at [409]-[410].

Wide Web has accumulated an unprecedented amount of information and equally notorious that a powerful electronic searching capacity, which few can provide, is needed to access that information and facilitate its meaningful exchange. Internet search engines like Google facilitate access to that wealth of information which is legitimately sought by searchers for purposes which, by and large, provide a substantial public benefit. For so long as the subject matter of the search results coincides with a subject of legitimate interest to the searcher, there is an occasion which attracts qualified privilege.

311 I would hold that Google's conduct in providing a search engine which allows persons to access the voluminous material on the internet, so as to better inform themselves about the way in which they wish to conduct their affairs or of matters of controversy, is, speaking generally, reasonable. Indeed as Google's submissions frequently repeated, there is no doubt that the exchange of information on the internet serves a great public purpose. Search engines which make that material accessible also serve that great public interest. The same reasons which support a finding of a sufficient interest for the purposes of common law qualified privilege support a finding that, as a general rule, the referencing of material on the World Wide Web is reasonable. Importantly the Google search engine is designed in a way in which there is a close match between at least the first few pages of search results and the searcher's query.

312 The criteria listed in s 28(3) of the *Defamation Act 2005* (SA) are primarily adapted to publication to the world at large because the extension of the common law defence was intended to address its limited applicability to the mass media in order to advance freedom of speech. It was not framed with internet searches in mind. However, the considerations listed in s 28(3) of the Act are not exhaustive as subparagraph (j) expressly makes clear. In *Rogers v Nationwide News Gaudron and Gummow JJ* observed:¹⁷⁷

[30] The considerations that bear upon the reasonableness of the conduct of a publisher of information for the purposes of s 22(1)(c) of the Act varied with the circumstances of individual cases. Some considerations of common relevance were set out by Hunt A-JA in *Morgan v John Fairfax and Sons Limited (No 2)* but reasonableness is not a concept that can be subjected to inflexible categorisation.

(citation omitted)

313 Even though subparagraphs (b) to (d) of s 28(3) of the *Defamation Act 2005* (SA) are more pointedly directed to mass media communications, they are generally applicable to the provision of information on the World Wide Web. I observe here that paragraphs of search results will necessarily have little room for differentiation between the matters mentioned in paragraph (d). In this particular case the matter published relates to Dr Duffy's public on-line activities but that will not often be the case.

¹⁷⁷ (2003) 216 CLR 327 at 339, [30].

314 There is a strong public interest in the expeditious provision of search results and the operation of search engines like Google is supported in that respect by subparagraph (e). It also follows that the requirement to verify information and distinguish between sources and between levels of certainty are necessarily ameliorated when expedition is desirable.

315 The business environment mentioned in subparagraph (f) includes the general nature of the World Wide Web and the public utility of the facility it provides and the demands it imposes on the form and speed of responses to search queries.

316 The verification considerations are apt for mass-media publications and weigh against search engines.

317 On the other hand, there is some difficulty in applying the second to fourth elements of reasonableness identified by Hunt A-JA to internet search engines. In the ordinary case of mass media communication to the public at large, the author of the defamatory material is expressing a personal view or stating facts based on personal observation or by reference to sources and therefore the author's belief in the truth is an important consideration in determining the reasonableness of his or her conduct.

318 The respondent submits, relying on *Morgan*, that conduct cannot be reasonable within the terms of the statutory defence of qualified privilege, as a general proposition, unless the author believes in the truth of the defamatory imputation. The appellant contends that the second and the third elements of statutory reasonableness identified by Hunt A-JA in *Morgan* are not applicable to the *Defamation Act 2005* (SA) because pursuant to s 9 of the *Defamation Act 1974* (NSW) the making of the imputation was the cause of action under that Act. By contrast the *Defamation Act 2005* (SA) by s 28 refers to the reasonableness of the publication of the defamatory matter. Matter is defined in s 4 to include an article, report advertisement in a newspaper, or magazine, or a program report or advertisement in an electronic broadcast. Section 8 of the *Defamation Act 2005* (SA) provides that a person has a single cause of action for defamation in relation to the 'publication of defamatory matter' about the person even if more than 'one defamatory imputation about the person is carried by the matter'. The provisions of Division 2 then apply statutory defences to the publication of defamatory matter.

319 I accept that the relevant considerations in determining whether the publication of the defamatory material was reasonable under the *Defamation Act 2005* (SA) are wider than those which were relevant when considering whether the making of the defamatory imputation was reasonable pursuant to s 22 of the *Defamation Act 1974* (NSW). I accept that under the *Defamation Act 2005* (SA) it is the reasonableness of the wider publication of the material in which the defamatory statement is made which must be addressed. Nonetheless the reasonableness of making the imputation, and therefore the reasonableness of the

belief in its truth, must continue to be a relevant and, indeed, an important consideration. Moreover the publication of search results, although in written form, raise policy considerations of the kind applicable to television broadcasts considered by Samuels JA in *Barbaro v Amalgamated Television Services Pty Ltd*.¹⁷⁸

320 Section 28 of the *Defamation Act 2005* (SA) does not expressly impose a determinative condition that an internet search engine, or any similar referencer to other material, must believe in the truth of a statement of fact made in the course of, and for the purposes of, making the reference. No such condition should be implied.

321 Importantly in the case of an internet search engine it is plain that the author, the operator of the search engine, is exercising no judgment on, and making no evaluation of, the reliability of the material. The search engine is a referencing service which gives access to the material in which the searched for words are prominently used.

322 I would conclude that Google's conduct is reasonable within the meaning of that expression is s 28(1)(c) of the Act.

323 The limits on the scope of the privileged occasion when an internet search engine is interrogated need not be fully circumscribed here. As I earlier observed, it the nature of an internet search engine that it might trawl up material in which enquirers have no interest. Other examples of extraneous material may include parasitic information gratuitously added by a search engine operator to the information searched for. In other cases, wider publication to persons who could not possibly have a legitimate interest may be proved. However, that has not been proved in this case.

324 The occasion may of course be defeated by malice. However, I observe that malice will rarely apply to a search engine operator precisely because of the automated way in which results are closely matched to search terms. Malice is more likely to be inferred from publication after notification of the defamatory nature of the paragraphs but only in cases in which the persons conducting the search could have no legitimate interest in the information. For the reasons I have given that is not this case.

325 In his conclusion at [410] on the issue of reasonableness, the Judge placed some weight on Google's failure to block the links after notification. Of course until that point, there was no publication. The non-expressed premise in that paragraph of the Judge's reasons is that none of the persons who searched Dr Duffy's name could have had a relevant interest in the information. Otherwise, Google's refusal to remove the material and block it in its search engines meant that members of the two classes of searchers to whom I referred

¹⁷⁸ (1989) 20 NSWLR 493 at 500-501.

would have been denied information which they had a proper interest in receiving. Google's failure to block the relevant URLs can only be characterised as unreasonable if there are good reasons to think that the material was being published to persons who had no interest in receiving it. I have acknowledged that it is possible that some people searched Dr Duffy's name as a matter of idle curiosity but that has not been proved.

326 Even if it were shown that some idly curious persons were searching for Dr Duffy's name and bringing up the impugned paragraphs, Google's conduct in not blocking the material should only be characterised as unreasonable if Google failed to block the paragraphs knowing that there was a material risk of publication to persons with no interest in receiving it. That has not been shown. It must be remembered that the blocking of the URL prevents persons with an interest in the psychic controversy, or who are contemplating entering into an employment or collaborative research relationship with Dr Duffy, learning of the lengths she was prepared to go in her pursuit of on-line psychics.

327 I therefore find that Google has established the defence of statutory qualified privilege.

Damages

328 By her cross-appeal, the appellant appeals against the quantum of the damages awarded by the Judge on the following grounds:

3.14. That the Judge should have awarded a higher amount than \$100,000 for general damages having regard to:

- the extent of the publication;
- the seriousness of the imputations;
- the duration of publication;
- the hurt and distress caused to the respondent; and
- the damage to the respondent's reputation.

329 In view of my holding that Google has established the defence of qualified privilege, I deal with this ground only as a matter of completeness.

330 The quantification of damages is a discretionary exercise. On appeal, this Court cannot interfere with that exercise of discretion on the ground only that it would have awarded a higher amount than the Judge. Dr Duffy must establish that the award is manifestly inadequate.

331 I commence by observing that the extent of the publication was limited to those who made the searches. As I have observed some of the searchers knew, or knew of, Dr Duffy socially or professionally whereas others, for example those

who searched because they were interested in the ongoing conflict between Dr Duffy and the psychics, may be scattered throughout Australia and are unlikely to have even a remote or indirect connection with Dr Duffy.

332 The imputation that Dr Duffy was a psychic stalker is not the most serious of defamations. There are many psychic sceptics who robustly expose the false or exaggerated claims of some psychics. Stalking and harassing is more than that but many would support Dr Duffy's campaign against psychics who mislead the vulnerable. Accepting, as I must on the admitted pleading, that an accusation that someone stalks psychics causes reputational damage, I would hold that that damage is not great given the widespread community debate and division over the conduct of psychics.

333 In so far as some searchers might have understood the paragraphs of the search results to accuse Dr Duffy of physically stalking psychics, the imputation is more serious, but that is not the predominant meaning which the paragraphs would have been given.

334 The claim that Dr Duffy is an embarrassment to her profession, which was made by reference only to the allegation that she stalks psychics does not add much to that underlying accusation.

335 The imputation that Dr Duffy harasses psychics and persistently or obsessively pursues them is more serious because it asserts a psychological dysfunction, but it is still not at the higher end of range of reputational damage. I would characterise the imputation that the plaintiff is unable to function in day to day life and has been laid off by the hospital at which she worked in the same way.

336 Dr Duffy also complains that the Judge only awarded damages only until January 2011 when the websites were not blocked until March 2011. That period of time is not material and in any event probably reflects what was properly proved about the form of the paragraphs by inference from Dr Duffy's searches.

337 Dr Duffy also complains that the Judge failed to take into account the 'grapevine' effect in assessing damages. There is no indication that the Judge did not have regard to that phenomenon in assessing damages. The effect is generally incommensurable and the failure to in some way adjust the finding as to the numbers to whom the paragraphs were directly published is therefore not indicative of error.

338 Overall I am not satisfied that the award is manifestly inadequate. On the contrary, I find it to be a generous one.

339 Dr Duffy complains that the trial Judge erred in failing to award economic loss. On 20 August 2010 Dr Duffy ceased employment after having received weekly workers compensation payments from the Department of Health for some

time. When Dr Duffy's employment was terminated she received a compensation redemption payment. The amount of the redemption payment was the equivalent of remuneration for about four to five years. The redemption agreement included a clause by which Dr Duffy agreed not to seek employment with any South Australian public sector agency, board or authority. Dr Duffy testified that she at all times intended to comply with that clause. She did not give evidence of looking for work between August 2010 and 2013. Dr Duffy testified that her mental health slowly improved after she received the redemption payment to the point where she felt ready to return to work.

340 Dr Duffy testified that she did not apply for work before 2013 because she believed that any prospective employer would probably discover the defamatory material published by Google. The Judge found that Dr Duffy decided not to look for work until after the three year anniversary of the redemption agreement in August 2013 because she did not wish to breach the clause precluding her from seeking employment with any South Australian government agency. The Judge found that Dr Duffy's decision not to work in the health research field for three years was made independently of publication by Google of the defamatory material in 2010.

341 Dr Duffy testified that in 2013 she telephoned universities enquiring about research and teaching opportunities but that nothing came of those enquiries. Dr Duffy gave evidence that after making those enquiries she believed, by checking on Google's analytics data, that the universities had searched her name. However, Dr Duffy did not particularise when in 2013 she made her enquiries and did not identify the university or departments which were the subject of her enquiries. The Judge was not satisfied that the Google analytics data showed that any university made a search for her name in connection with her employment enquiries. The Judge rejected Dr Duffy's evidence that any university had made such an enquiry in response to a job application by her.

342 The Judge was not persuaded by Dr Duffy's evidence that her concern about an employer discovering the defamatory material through Google was a reason for not applying for work. The Judge found that 'there was no basis for [Dr Duffy] to consider that any prospective employer would necessarily decide on the basis of a Google search for her name not to entertain any possibility of employing her'.¹⁷⁹

343 Damages, whether classified as special or general, may be awarded for a loss of earning capacity caused by reputational damage.¹⁸⁰ The Judge found that, for the reasons given, Dr Duffy did not suffer any actual loss of earnings by reason of reputational damage. A loss of earning capacity, even if it is not possible to prove a particular pecuniary loss, may attract an award of damages if

¹⁷⁹ *Duffy v Google (No 2)* [2015] SASC 206 at [56].

¹⁸⁰ *Chakravarti v Advertiser Newspapers Limited* (1998) 193 CLR 519 at 558-559, [98]-[99] per Gaudron and Gummow JJ; at 601, [179] per Kirby J.

lost earning capacity is an aspect of general damages. However, in this case the evidence of any loss of capacity is so speculative that in the absence of proof of actual loss, the Judge was correct to make no award. The Judge found that it was entirely speculative how a prospective employer would have reacted to an internet search of Dr Duffy's name. Dr Duffy called no evidence on the effect of the defamation on her employability from a prospective employer or employment agency.

344 The Judge found that between August 2010 and mid-2012, Dr Duffy was not suffering from depression or any psychiatric condition that would cause her not to make enquiries about employment in the health research field if she had been interested in returning to such employment. There is no basis on which to interfere with those findings of fact. They are strongly supported by the evidence and are not obviously inconsistent with any admitted, or other objective, fact. On the basis of those facts the Judge concluded that Google's publication in 2010 of the defamatory material was not a cause of Dr Duffy's not seeking employment in the health research field between August 2010 and August 2013. The Judge also found that any impairment of Dr Duffy's capacity to find employment after 2013 could not be related to the defamatory material published in 2010.

345 Dr Duffy also relied on a loss of earning capacity resulting from a major depression brought about by her mental illness. Dr Duffy's treating psychologist was Ms Freeman. She testified that Dr Duffy recovered from her depression by January 2010 and was not depressed throughout 2010. A report from Ms Freeman to Dr Duffy's general practitioner in January 2011 reported that she had emerged in very good spirits and was not depressed. Ms Freeman stopped treating Dr Duffy in April 2011. Thereafter, neither Ms Freeman nor Dr Duffy considered that she needed to continue with psychotherapy until Dr Duffy returned to see Ms Freeman in October 2012 when she had suffered a relapse. Ms Freeman testified that Dr Duffy suffered from a major depression in 2009 but had not suffered from depression between January 2010 and mid-2012. Ms Freeman testified that from October 2012, Dr Duffy relapsed into a major depression. Ms Freeman opined that if the defamatory material on Google's search engines were removed that Dr Duffy's prognosis was positive and she would be able to return to work in the health research field between six months and two years of the cessation.

346 Dr Davis is a psychiatrist who was called as a witness by Google. Dr Davis expressed the opinion that Dr Duffy had suffered from dysthymia all her adult life but that it had waxed and waned. He agreed that she suffered major depression between 2006 and 2009 but his opinion was that she had not suffered from major depression after 2010 onwards. In Dr Davis' opinion, Dr Duffy was able to work in the health research field from 2010.

347 The Judge found that Dr Duffy suffered from major depression off and on between 2006 and 2009 and that the primary causes of her depression between

November 2008 and December 2009 were work related stresses. The Judge found that Dr Duffy was not suffering from depression or dysthymia between the beginning of 2010 and the middle of 2012 but that if she did, it was limited to an underlying base level of adult, lifelong dysthymia. In accordance with the opinion of Dr Davis the Judge found that it was not aggravated by Google's conduct in publishing the defamatory material. The Judge found that Dr Duffy was not precluded from seeking or obtaining employment in that period. He found that she did not seek employment for reasons unconnected with Google's publication of the defamatory material.

348 The Judge did find that Dr Duffy was suffering from either depression, as Ms Freeman had diagnosed, or dysthymia, as Dr Davis had found, from shortly before October 2012. The Judge did not find it necessary to make a finding as to whether Dr Duffy's mental health had precluded her from seeking or obtaining employment from October 2012 because the Judge found that to the extent that Dr Duffy continued to suffer from depression it was caused by the publication of defamatory material in and since 2012 and not by the historical publication of defamatory material in 2010.¹⁸¹

349 The appellant has not shown the Judge's conclusions to be wrong. The Judge had the advantage of hearing the testimony of Ms Freeman and Dr Davis. More importantly, the Judge had the inestimable advantage of assessing Dr Duffy's testimony. The Judge's finding is supported by the long period of apparent good mental health throughout 2010 and until October 2012.

350 On the Judge's findings Dr Duffy failed to show a causal effect between the publication of the defamatory material in 2010 and any psychic or psychological dysfunction affecting her earning capacity at any relevant time.

351 It follows that the Judge found that in the period if the publication by Google of the defamatory material had diminished Dr Duffy's earning capacity it had not been productive of any loss. In all of the factual circumstances found by the Judge, there was no basis to make any award for what remained at most a notional loss of earning capacity. That is particularly so given that the defamatory statement that was likely to be of greatest concern to a prospective employer was the imputation, which Google justified, that Dr Duffy had misused her computer to send emails.

352 Dr Duffy complains also that the Judge erred in failing to award aggravated damages for Google's failure to apologise and its maintenance of the plea of justification. Neither the failure to apologise nor the pleading of the defence of justification, of themselves, warrant the making of an award of aggravated damages. Given the complexity and novelty of the claims pursued by Dr Duffy, neither the failure to apologise nor the pleading of the defence of justification evidences bad faith or improper or unjustifiable behaviour. In particular, Google

¹⁸¹ *Duffy v Google (No 2)* [2015] SASC 206 at [73].

had a reasonable evidential foundation for seeking to justify the imputations that Dr Duffy was a psychic stalker.

Conclusion

353 I would allow the appeal and set aside the judgment against Google. I would order instead that Dr Duffy's claim be dismissed.

354 **PEEK J:** I substantially agree with the judgment of the Chief Justice and his conclusions on all of the issues, except for the defence of qualified privilege. The following reasons are in the main limited to that defence, as to which I would find in favour of the plaintiff. I would therefore dismiss the appeal.

Introduction

355 The stage is sufficiently set by reference to the following opening paragraphs of the trial Judge's reasons:

[2] In December 2007, two articles concerning Dr Duffy were published on the Ripoff Report website. Two more articles were published in August 2008, with a further article in December 2008 and one in January 2009.

[3] Dr Duffy claims that the articles and comments thereon (*the Ripoff Report material*) contained defamatory imputations. The pleaded imputations include that she stalks psychics; obsessively and persistently harasses psychics; fraudulently and/or maliciously accesses other people's electronic emails and materials; spreads lies; threatens and manipulates other people; is an embarrassment to her profession; misused her work email address for private purposes and engaged in criminal conduct.

[4] Other websites, namely Complaints Board, 123 People, Is This Your Name and Wiki Name, published material concerning Dr Duffy ostensibly derived from the Ripoff Report material (*the secondary material*).

[5] In July 2009, Dr Duffy became aware that searches for her name on Google's websites resulted in the display of extracts from and hyperlinks to the Ripoff Report material. In September 2009, she notified Google of the Ripoff Report material that she claimed was defamatory of her and being republished by Google, and of extracts from the Ripoff Report material and some of the secondary material that she claimed were defamatory of her and being published by Google. She requested removal of that material. Google declined the request.

[6] In February 2011, Dr Duffy instituted this action. Between March and November 2011, Google progressively removed the display of extracts from and hyperlinks to the Ripoff Report material from its Australian website.

356 Google's appeal concerning qualified privilege is limited to the topic of statutory qualified privilege enacted by s 28 of the *Defamation Act 2005* (the Act).¹⁸² The "apparent interest" alternative in that section is not sought to be relied upon. An appeal against the quantum of damages was abandoned at the appeal hearing. The presently relevant ground of appeal is as follows:

34. His Honour erred in holding that the defence of statutory qualified privilege under section 28 of the Act was not established (Reasons on Liability at [407], [410]), in that:

¹⁸² The Judge's finding that common law privilege was not established by the defendant is not appealed against; an earlier ground of appeal concerning common law qualified privilege was specifically abandoned in the final iteration of Google's third notice of appeal.

- a. His Honour erred in holding that the persons to whom the matters complained of were published did not have an “interest” within the meaning of section 28(1)(i) of the Act (Reasons on Liability at [406], [407]); and
- b. His Honour erred in holding that the appellant had not established that its conduct was reasonable in the circumstances (Reasons on Liability at [410]).

Overview and summary of these reasons

357 The following paragraph will serve as an overview or summary of these reasons.

Internet publication and the multiple publication rule

- The plaintiff has distinct causes of action for each of the proven publications.¹⁸³

Proving publication on the internet

- A plaintiff may prove by way of inference the publications by a defendant through the medium of a search engine.

The platform of facts from which an inference of publication can be drawn

- The Judge correctly delineated “the platform of facts” and correctly found that three publications to Ms Palumbo and publications to “a substantial number of persons unknown” were established.

Section 28(1)(a) of the Act

- The common law background is that a private “interest” of a defendant will only prevail over the protection of a plaintiff’s reputation if the “interest” is of a class that is both substantial and of some importance – “not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news”.¹⁸⁴ “Mere curiosity in the subject matter of a defamation or a mere avidity for information about the subject is not, without more, sufficient to attract an occasion of qualified privilege, however widespread the curiosity or avidity for information may be ... The titillation of calumny is not to be mistaken for the public interest ... one has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip.”¹⁸⁵
- As to s 28(1)(a), the defendant’s contention is that by entering a search term the user indicated an interest in accessing information relevant to that term, and in providing that information, the defendant was acting pursuant to its

¹⁸³ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [27] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹⁸⁴ *Howe & McColough v Lees* (1910) 11 CLR 361, 393, 398 (Higgins J).

¹⁸⁵ *Stephens v West Australian Newspapers Ltd* [1994] HCA 45; (1994) 182 CLR 211 (Brennan J).

interest as the operator of a search engine in responding to that user's topic of interest.

- This contention is deeply flawed. Whether a statement falls within the required class can only be determined after careful examination of the 'interest' said to be involved. An interest in the required sense is "a real and direct personal, trade, business or social concern".¹⁸⁶ The word 'interest' is used "in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news."¹⁸⁷ "It is used in the broader, popular sense of a matter of substance in which the relevant audience might legitimately have an interest in knowing, as long as that interest goes beyond being a matter of curiosity or prurient interest. The interest or apparent interest may be direct or indirect, but it must nevertheless be definite or tangible, and not vague or insubstantial".¹⁸⁸
- The word "subject" in s 28(1) serves two purposes. First, "(t)he nature of the subject will determine whether, in the court's view, the recipient has an interest in having information concerning that subject".¹⁸⁹ Secondly, the word "subject" forms a bridge between s 28(1)(a) and s 28(1)(b) – each refer to the same particular subject.

Section 28(1)(b) of the Act

- The "in the course of" requirement equates to the common law requirements that the matter must be both relevant and "reasonably appropriate" (in the sense of proportionate) to the particular occasion.
- The fact that defamatory words were published *at the same time as* words giving readers information about a relevant subject does not mean that the defamatory words were published *in the course of* giving readers information about the relevant subject. To fall within s 28(1)(b), the defamatory words must be "sufficiently connected" with the subject that may have been of interest.¹⁹⁰

The onus of proof

- "The defence of qualified privilege is a plea in confession and, as such, is predicated upon the existence of a defamatory imputation to which the

¹⁸⁶ *Telegraph Newspaper v Bedford* (1934) 80 CLR 632 (Evatt J with whom Rich and McTieman JJ concurred).

¹⁸⁷ *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 40 (Hunt J); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299, 311-312.

¹⁸⁸ *Stone v Moore* [2016] SASFC 50, [114] (Doyle J with whom Kourakis CJ and Stanley J agreed).

¹⁸⁹ Tobin & Sexton (eds), *Australian Defamation Law & Practice* (Butterworths, 2nd ed, 2003) [14,100].

¹⁹⁰ Cf *Rogers v Nationwide News* (2003) 216 CLR 327, 346-347 (Hayne J).

privilege attaches.”¹⁹¹ The defendant must prove each of the requirements in s 28(1) in relation to each separate publication.

The three publications to Ms Palumbo

- The Judge accepted Ms Palumbo as an honest and reliable witness.
- Defamation is established even if the publishee disbelieves the material.
- Qualified privilege did not apply to the first publication to Ms Palumbo because it was not proven that the defamatory matter was published to her *in the course of giving her information on the subject* of smoking.
- Qualified privilege did not apply to the second and third publications for that same reason and, in addition, for the anterior reason that it was not proven that the searches on both occasions were not made from curiosity alone and no *subject* within the meaning of s 28 was established.

The publications to a substantial number of persons unknown

- The Judge’s finding that defamatory matter was published to a substantial number of persons unknown led to a further finding that the respective multiple causes of action are each made out, *unless* the defendant proves qualified privilege in respect of each such cause of action. It failed to do so.

Sections 28(1)(c) – the reasonableness requirement

- In addition to the above requirements, the defendant must prove that “its conduct in publishing the matter is reasonable in the circumstances”.¹⁹² The Judge found that “Its conduct is incapable of being characterised as reasonable in the circumstances.” The evidence clearly justifies that conclusion.

358 I turn to consider the above matters in somewhat greater detail.

THE MULTIPLE PUBLICATION RULE AND PROVING INTERNET PUBLICATION

359 The “Multiple Publication Rule” is a cornerstone of Australian defamation law. Where a matter (defamatory of the plaintiff) is intended to be read (or it is anticipated that it will be read) by more than one person, there is a different publication, and a separate cause of action, each time that matter is in fact read.¹⁹³

¹⁹¹ *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 (Gummow J).

¹⁹² *Papaconstantinos v Holmes á Court* (2012) 249 CLR 534 (French CJ, Crennan, Kiefel and Bell JJ).

¹⁹³ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 [27] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Emmerton v University of Sydney* [1970] 2 NSW 633, 634 (Sugerman P and Jacobs JA), 639 (Holmes JA).

360 While publication on the internet only occurs when the matter is downloaded on the publishee's computer,¹⁹⁴ each such publication constitutes a separate cause of action. As stated in *The Law of Defamation and the Internet*:¹⁹⁵

Each separate publication of the same matter potentially gives rise to a distinct cause of action.¹⁹⁶

Arguments that different rules should apply to matter published via the Internet, having regard to its global and geographically indeterminate nature, and the spectre of Internet publishers being exposed to the risk of defamation actions in every corner of the globe, have not found judicial favour.¹⁹⁷ Each receipt of a defamatory e-mail message or bulletin board posting, and each display of a defamatory web page, is thus a separate publication, in respect of which a distinct cause of action potentially arises.¹⁹⁸

361 Thus in *Dow Jones & Company Inc v Gutnick*,¹⁹⁹ the plurality stated:²⁰⁰

The tort of defamation, at least as understood in Australia, focuses upon publications causing damage to reputation... it is a tort concerned with damage to reputation and it is that damage which founds the cause of action. ...

Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it

¹⁹⁴ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

¹⁹⁵ Collins (ed), (2nd ed, 2010, Oxford University Press) [5.24].

¹⁹⁶ *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, 527; *Webb v Bloch* (1928) 41 CLR 331, 363; *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6, 7; *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3, [123]; *Berezovsky v Michaels* [2000] 2 All ER 986, 993; *Godfrey v Demon Internet Ltd* [2001] QB 201, 208-9; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [44], [64], [124]; *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783, [57]; *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453 (Singapore High Court), [34]-[35]. The European Court of Human Rights has held that this rule does not violate the right to freedom of expression in art 10 of the ECHR: *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* [2009] EMLR 14. In the US, by contrast, a 'single publication' rule generally applies, so that only one cause of action may be brought in respect of all publications of the same material.

¹⁹⁷ *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783: adoption of an American-style single publication rule rejected ...; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575: single publication rule rejected; location of web servers or uploading as determinant of the place of publication rejected ...; *Carter v British Columbia Federation of Forster Parents Association* (2005) 42 BCLR (4th) 1 (BCCA), [18]-[20]. See also *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* [2009] EMLR 14 ...

¹⁹⁸ *Lee Teck Chee v Merrill Lynch International Bank Ltd* [1998] 4 CLJ 188 (High Court of Malaysia) (print and online editions of newspapers); *Godfrey v Demon Internet Ltd* [2001] QB 201, [208]-[209] (bulletin board postings); *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783 (online archives); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 (subscription website); *Harrods Ltd v Dow Jones & Co Inc* [2003] EWHC 1161 (QB), [36] (web pages); *King v Lewis* [2005] EMLR 4, [2] (postings published when downloaded); *Barrick Gold Corp v Blanchard & Co* (2003) 9 BLR (4th) 316 (ONSC), [41] (web site accessible in Ontario); *National Auto Glass Supplies (Australia) Pty Ltd v Neilsen & Moller Autoglass (NSW) Pty Ltd* (2006) 156 FCR 148, [24] (e-mails published when read); *Emperor (China Concept) Investments Ltd v SBI E-2 Capital Securities Ltd* [2006] 1 HKC 266 (Hong Kong Court of First Instance), [12] (e-mails published where read); *Research in Motion Ltd v Visto Corp* (2008) 93 OR (3d) 593 (ONSC), [87]-[92] (statements made in the media and posted online in the UK and the US, but accessible in Ontario); *Black v Breeden* (2009) 309 DLR (4th) 708 (ONSC), [35] (press releases posted on a website).

¹⁹⁹ (2002) 210 CLR 575.

²⁰⁰ (2002) 210 CLR 575, 600, 607 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.

The bilateral nature of publication underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action. That rule has found reflection from time to time in various ways in State legislation and it would be a large step now to depart from it.

Proving publication on the internet

362 In the case of publication of defamatory matter to a known person(s) there is not only a remedy in damages but also an opportunity for the plaintiff to approach that person(s) and ensure that the falsity of the material is known and accepted.

363 However, in many cases, what is of most significance to the plaintiff is the substantial number of unidentifiable persons who have likely become aware of the defamatory matter, directly or indirectly. The rule generally applicable to mass media, such as newspapers, radio and television, is that publication to the respective circulation audiences is presumed. While the position concerning proof of publication on the internet is somewhat different (in that publication only occurs when the matter is downloaded on the publishee’s computer²⁰¹), proof of reputational damage through a process of proof by inference is well established and a plaintiff may prove publication by a search engine by way of inference.

364 The following statement in *Gatley on Libel and Slander (Gatley)* as to the requirements has been often cited with approval:²⁰²

Where the publication complained of is in a newspaper, book or other publication “to the world at large”, the claimant is not expected to plead particular acts of publication, the court accepting that publication in such cases is to be inferred. Where the publication complained of is on the internet, the claimant must identify the individual readers *or plead a platform of facts from which an inference of publication can be drawn*.²⁰³
(Emphasis added)

365 In *The Law of Defamation and the Internet*, the position is stated thus:²⁰⁴

The claimant bears the burden of establishing publication. That burden can be discharged directly, by proving that at least one person, other than the claimant, saw, read, or heard the communication. In appropriate cases it may also be proved indirectly, by an inference

²⁰¹ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

²⁰² (Sweet & Maxwell, 12th ed), [26.5-26.7].

²⁰³ This approach was adopted by Bleby J in *Sands v Channel Seven Adelaide Pty Ltd and Anor* (2009) 104 SASR 452: “There is no presumption of law that there has been substantial publication in respect of an internet publication. It is for the plaintiff to prove that the material in question was accessed and downloaded. In this case there has been no “platform of facts” proved by the plaintiff from which an inference can be drawn that substantial publication of the website article occurred within South Australia.”

²⁰⁴ Collins (ed), *The Law of Defamation and the Internet* (Oxford University Press, 3rd ed, 2010) 69-70.

that publication must have occurred. There is, however, no presumption of law that matter appearing on the Internet has been published. There must be a substratum of fact to support an inference of publication. It is not sufficient for the purposes of proving publication for a claimant simply to allege that defamatory matter was posted on the Internet and was accessible in the jurisdiction of the court. (Citations omitted)

And in *Australian Defamation Law & Practice (Tobin & Sexton)* it is added:²⁰⁵

Where there is evidence of material being immediately accessible by entering a person's name into a search engine website, a court may conclude that the likelihood of another person having accessed such material is irresistible. The scope of such publication may be established by inference from other evidence in the same way as may be done in the case of more traditional forms of publication. (Citations omitted)

The platform of facts from which an inference of publication can be drawn

366 In the present case, the Judge observed:

[298] In the case of newspapers with a large circulation and radio and television broadcasts with a large audience, an inference is readily drawn that persons unknown read, heard or saw the defamatory matter.²⁰⁶ The same approach is applicable to internet versions of newspapers and the like which have a large circulation. In the case of interactive use of the internet, this inference cannot be drawn as a matter of course, ie there is not a "presumption" that there were publishees unknown as in the case of print, radio, television and internet media.²⁰⁷ The facts and circumstances must be analysed in the traditional way to determine whether the inference should be drawn.²⁰⁸

[299] In *Pritchard Englefield (A Firm) v Steinberg*,²⁰⁹ Mr Steinberg placed on his website a copy of a letter to Pritchard Englefield accusing them of inflating their costs. Pritchard Englefield could only identify one person who read the letter. The English Court of Appeal held that an inference of substantial publication to persons unknown should be drawn. Sedley LJ (with whom Ward and Longmore LJ agreed) said:

The copy letter from Mr Steinberg to Pritchard Englefield, suggesting in no uncertain terms that the latter artificially and unprofessionally inflated their solicitor and own client costs, was accessible to anyone, including in particular a potential client, who fed the claimant's name into a standard search engine. It was also readable by anyone who accessed the defendant's own professional website. The inference of substantial publication was, it seems to me, irresistible.²¹⁰

²⁰⁵ (Butterworths, 2nd ed, 2003) [24,010].

²⁰⁶ *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 1 WLR 651, 658-659 (Scarman J); *Nationwide News Pty Ltd v the University of Newlands & Anor* [2005] NZCA 317, [48] (Glazebrook, Hammond and Panckhurst JJ).

²⁰⁷ *Nationwide News Pty Ltd v the University of Newlands & Anor* [2005] NZCA 317 [27]-[29] (Glazebrook, Hammond and Panckhurst JJ); *Al Amoudi v Brisard* [2006] EWHC (QB) 1062, [2007] WRL 113 [28]-[38] (Gray J).

²⁰⁸ *Al Amoudi v Brisard* [2006] EWHC 1062 (QB) [28]-[38] (Gray J).

²⁰⁹ [2005] EWCA Civ 288, (2005) 149 SJLB 300.

²¹⁰ [21].

367 The English Court of Appeal in *Pritchard* predicated downloading (and hence publication) by publishees, either by using a search engine or downloading direct from the defendant's website.²¹¹

368 The Judge made the following findings at paragraphs [203] to [262] of his judgment in favour of the plaintiff:

- First, the paragraphs displayed by the Google websites to users in response to searches for Dr Duffy's name were "published" by Google;
- Second, the content of the external webpages was republished by Google when users clicked on hyperlinks displayed by the Google website when conducting searches for Dr Duffy's name;
- Third, the generation by the Google websites of the words "janice duffy psychic stalker" when a user entered the search term "janice duffy" was a publication by Google (in the circumstances where notification had been given and Google had failed to remove it within a reasonable time thereafter); and
- Fourth, the secondary publisher doctrine applies on the basis of Dr Duffy having given Google adequate notice concerning the types of publications complained of (in September 2009, October 2009, July 2010 and July 2011 respectively).

369 At paragraphs [263] to [351] the Judge, under the heading "Publication: the publishee", considered a number of potential "publishees", two of which were Ms Therese Palumbo and a class, "Persons unknown".²¹² I turn to those two classes.

The publications of defamatory matters to Ms Therese Palumbo

370 Ms Palumbo gave evidence at trial and the Judge accepted her evidence.²¹³ The Judge correctly found that the plaintiff had proven three separate defamatory publications to Ms Palumbo. His Honour stated:

²¹¹ *Ex abundanti cautela*, to refer to the above passage in *Pritchard Englefield* was in no way to overlook, or ignore, the precept that publication on the internet only occurs when the matter is downloaded on the publishee's computer. The Judge was plainly aware of that, having referred to *Dow Jones & Co Inc v Gutnick* in his judgment at [167], [177], [282], [158] fn 4, [165] fn 60, [178] fn 90 and [305] fn 185.

²¹² The other two classes consisted of Mr Trkulja, and the South Australian Department of Health (comprising executives and employees of the Department of Health, WorkCover claims managers and their lawyers from the Crown Solicitor's office) as to both of which classes the Judge held, at [293] and [296] respectively, that the plaintiff had failed to establish that publication was made by the Google search engine at a relevant time.

²¹³ At [137] his Honour stated: "Ms Palumbo was a straightforward and impressive witness. I accept her as an honest and reliable witness."

[283] I accept (without deciding) that there might not be an actionable publication if a plaintiff instigates a friend to access from a website defamatory matter solely for the purpose of the plaintiff relying on it as publication to give rise to a cause of action.²¹⁴ However, while Ms Palumbo made her search in 2012 following and as a result of Dr Duffy telling her that the defamatory material was still on the internet, she nevertheless made that search of her own volition and it was not instigated by Dr Duffy.

I am satisfied that Google published to Ms Palumbo:

1. the first and second Ripoff Report webpages and paragraphs relating to them in June 2010 and late 2010; and
2. the Autocomplete term “janice duffy psychic stalker” in 2012.

The evidence of Ms Palumbo

371 Ms Palumbo worked as a hairdresser from 1984 to 2012, including at a hairdressing salon from 2006 to 2009, and as a self-employed hairdresser from 2009 to 2012. She met Dr Duffy while working at the salon and became Dr Duffy’s regular hairdresser, with appointments scheduled every six to eight weeks.

372 On 25 June 2010, during such an appointment, Ms Palumbo expressed her desire to quit smoking because she knew someone who had just been diagnosed with severe lung disease. In response, Dr Duffy said that she had worked with a professor (whose name she gave to Ms Palumbo) who was a leading expert in the field of treatments for lung disease and assistance in quitting smoking. Dr Duffy suggested that she could look him up online.

373 In the event, that night Ms Palumbo searched the name of Dr Duffy rather than that of the professor. She gave evidence that “[basically]... the first thing that popped up was this website called Ripoff Report and I saw that [Dr Duffy] was a psychic stalker”. She said that many of the results on the page originated from the Ripoff Report website, and stated words to the effect that Dr Duffy was “an Australian psychic stalker”.

374 When Dr Duffy attended for her next appointment, Ms Palumbo mentioned the Ripoff Report search results. Dr Duffy said that she was aware of the results, and had been attempting to get them removed for some time.

375 Ms Palumbo gave evidence that “a few” or, “about six months” later, she searched Google for “Dr Janice Duffy”, and saw the Ripoff Report at the top of the search results, and several references to the words “psychic stalker”. Ms Palumbo said her reason for conducting this search was that “curiosity gets the better of you”.

²¹⁴ Even if this extreme situation, in the pre-internet context it has been held that there is an actionable publication: *Ward v Smith* (1830) 6 Bing 749, 752 (Tindall CJ); *Duke of Brunswick v Harmer* (1849) 14 QB 185, 188, 189 (Coleridge J); *Pullman v Water Hill & Co Ltd* [1891] 1 QB 524, 528, 529 (Lord Esher).

376 Ms Palumbo gave evidence that she again searched for “Dr Janice Duffy” or similar in 2012, after Dr Duffy mentioned to her that the search results still appeared. She recalled that many of the first search results still referred to Dr Duffy as an “Australian psychic stalker”, and originated from the Ripoff Report website.²¹⁵ Ms Palumbo also gave evidence that “probably” during the 2012 search, (or possibly during the second 2010 search), the auto-complete search term “janice duffy psychic stalker” appeared as the first option.

377 Ms Palumbo also gave evidence that she searched for “Dr Janice Duffy” in the month of April or May of 2015, after Dr Duffy approached her to give evidence in the trial. Again, she said that this was “more out of curiosity than anything else”. She said that the auto-complete search term also appeared at this time.²¹⁶

Defamation is established even if the publishee disbelieves the material

378 The plaintiff was not required to explore whether Ms Palumbo believed the defamatory matter. As stated in *Gatley*:²¹⁷

To be defamatory an imputation need have no actual effect on a person’s reputation; the law looks only to its tendency, so there is a cause of action even if the words were not believed by the audience.

379 Even if defamatory matter is only published to a small group, the matter does not cease to be defamatory even if each member asserts disbelief. The hurt and anxiety caused to a person will not be eliminated by such statements of disbelief. The person may still suffer very considerable anger and upset since, apart from anything else, it is usually impossible to know just what was really thought, consciously or subconsciously, irrespective of disclaimers of belief. Thus in *Morgan v Odhams Press*,²¹⁸ Lord Morris stated:²¹⁹

Here I must refer to a contention which was raised in argument. It was submitted that if defamatory words concerning A are published to B who refuses to believe that the words are true then A would have no cause of action. I consider that such a contention is completely fallacious. Apart from any question affecting the measure of damages A’s rights would be unaffected by the circumstance that B in fact disbelieved the words. I agree with what Goddard LJ said in *Hough v London Express Newspaper Ltd*:

If words which impute discreditable conduct to my friend are used, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue.

²¹⁵ The Judge did not find publication proven at this time as the first six Ripoff Report webpages had been removed by this time; and Dr Duffy had either not notified Google, nor was not suing, in respect of the subsequent Ripoff Report webpages: (2015) 125 SASR 437, [276].

²¹⁶ The Judge did not find publication to have occurred at this time for similar reasons to those referred to immediately above: (2015) 125 SASR 437, [278].

²¹⁷ (Sweet & Maxwell, 11th ed, 2008) [2.1].

²¹⁸ [1971] 1 WLR 1239; [1971] 2 All ER 1156.

²¹⁹ [1971] 1 WLR 1239, 1252; [1971] 2 All ER 1156, 1168-1169.

And Lord Reid observed:²²⁰

One of the witnesses thought that the article referred to the plaintiff but completely disbelieved it; he thought it was rubbish. It was argued that he must be left out of account because no tort is committed by making a defamatory statement about X to a person who utterly disbelieves it. That is plainly wrong. It is true that X's reputation is not diminished but the person defamed suffers annoyance or worse when he learns that a defamatory statement has been published about him.

380 Further, one cannot ever be sure that the matter will not leak and spread beyond the original recipient(s). Indeed, in the case of Ms Palumbo, the matter was innocently, but actively, spread; she gave evidence that "*she told her husband, as well as a few people that I worked with and my friends*".

Substantial publication to "persons unknown"

381 The second of the two classes of potential "publishees" found by the Judge to be actual publishees was the class of "persons unknown". This is the most important class because of the numerous publications. It received commensurate attention from his Honour, who stated:

[300] Dr Duffy tendered documents in support of a circumstantial case that relevant searches of the Google website were undertaken. These were printouts or screenshots of inquiries made by Dr Duffy on the Google AdWords website (adwords.google.com). Dr Duffy gave evidence that she selected the Keyword Tool from the Tools and Analysis menu on the AdWords website. The Keyword Tool enables a user to:

- enter a search term
- select Google website (eg google.com.au);
- select device type (eg desktop and laptop devices);
- select closely related ideas or not;
- select Match Type (eg Phrase Match Type);
- select location (eg Australia); and
- select language (eg English).

[301] The Keyword Tool generates data showing the number of local average monthly searches (for the selected location) and global average monthly searches (regardless of location) over the preceding 12 months for prescribed match type matches to the entered search term in the selected language.

...

[305] Dr Duffy undertook Keyword Tool inquiries for searches in various countries including Australia, the United Kingdom and the United States. ... I have regard only to searches conducted in Australia.

²²⁰ [1971] 1 WLR 1239, 1246; [1971] 2 All ER 1156, 1163.

[306] Dr Duffy's first Keyword Tool inquiry was conducted on 1 September 2011. Inquiries for "Janice Duffy" using Broad Match type and Phrase Match type showed 480 local (Australian) monthly searches and 1300 global monthly searches for each Match type. Inquiries for "Dr Janice Duffy" using Broad Match type showed 260 Australian monthly searches and 320 global monthly searches and using Phrase Match type showed 210 Australian monthly searches and 260 global monthly searches.

[307] Dr Duffy conducted four further Keyword Tool inquiries.²²¹ The results of the five inquiries for local (Australian) searches are summarised in the following table:

Date	Match type	janice duffy	dr janice duffy	Janice duffy psychic stalker
1.9.2011	Broad (Phrase)	480 (480)	260 (210)	
2.3.2012	Broad	880	390	91
29.8.2012	Broad (Phrase)	590 (590)	260 (210)	
26.10.2012	Broad	590	260	46
13.6.2013	Broad	320	140	110

[308] Dr Duffy also tendered a document produced by Google for the purpose of the action showing number of searches emanating from Australia (based on searcher's IP address) using the Google search engine from 1 August 2013 to 31 October 2014. This showed 278 searches for "Janice Duffy" and 196 searches for "Dr Janice Duffy".

[309] Google has not retained any data showing the number of searches on the Google Australian website for "Dr Janice Duffy" and "Janice Duffy" before August 2013. That data would have been available for at least the 12 months ending in March 2011 if Google had chosen to retain it upon being served with the summons in the action.

[310] The earliest period for which data is now available is from September 2010 to August 2011 referred to at [306] above. That data shows large numbers of searches being conducted for both "Dr Janice Duffy" and "Janice Duffy" over that period. There is no reason to believe that the number of searches increased dramatically between October 2009 and August 2011. By contrast, in October 2011 Dr Duffy began her blog and in November 2011 there was media publicity about this action which was likely to increase searches for Dr Duffy's name and this is borne out by the table at [307] above. I find that between October 2009 and February 2011 there were at least 100 monthly searches for "Dr Janice Duffy" and at least 200 monthly searches for "Janice Duffy".

²²¹ There were also inquiries for more complex search terms including "janice duffy adelaide" and "janice duffy australia" but these produced much smaller numbers of searches.

382 The Judge then proceeded, first, to analyse methodically, in a number of categories, the evidence relied upon by the plaintiff to demonstrate that searches using the keywords “Dr Janice Duffy” and “Janice Duffy” would have displayed defamatory material from a number of webpages relied upon by the respondent; and second, to address the ultimate question of whether she had proved that Google had published that defamatory material to a substantial number of persons.

383 In order to convey his Honour’s methodology without undue repetition, I will reproduce only the first category of searches examined: “*Dr Janice Duffy*”: *first and second Ripoff Report webpages*”. As to that category, his Honour stated:

[311] In relation to searches in Australia on the Google Australian website for “Dr Janice Duffy”, it is likely that persons searching for that term were searching in relation to the plaintiff. The plaintiff was the only “Dr Janice Duffy” in Australia and the inclusion of the title “Dr” strongly suggests that the searcher was not searching for another Janice Duffy.

[312] The searches between January and December 2010 tendered at trial show paragraphs returned on a search for “Dr Janice Duffy” relating to the first and second Ripoff Report webpages as follows:

Janice Duffy – Psychic Stalker Psychics Beware Of...

Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher ...

www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached

Rip-off Report Dr Janice Duffy ...

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide, South Australia Adelaide, South Australia

www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm Cached

[313] It is likely that a significant proportion of persons searching for “Dr Janice Duffy” read these paragraphs relating to the first and second Ripoff Report webpages. I make this finding because searches by Dr Duffy between January and December 2010 generally showed these paragraphs on the first page of search results and I have found that the searches by Ms Palumbo in late 2010 showed those paragraphs.

...

[315] Mr Trkulja’s search in April 2012 on the Google Australian website produced search results referring to the Ripoff Report. While this was after the period presently being considered and the paragraphs must have been references to webpages other than those for which Dr Duffy is suing, it tends to confirm that webpages on the Ripoff Report were assigned a relatively high priority by Google’s algorithms when users searched for Dr Duffy’s name. Similarly, while his search was undertaken before the period presently

being considered and may have used a different search engine, Mr Shearer's January 2009 search suggests that search engine algorithms at the generic level tended to assign a relatively high priority to webpages on the Ripoff Report when users searched for Dr Duffy's name. Both these items of evidence are relatively minor, but add some weight to my conclusion that a significant proportion of persons searching for "Dr Janice Duffy" saw the paragraphs relating to the first and second Ripoff Report webpages.

[316] A significant proportion of searchers whose searches returned paragraphs relating to the first and second Ripoff Report webpages are likely to have read those paragraphs. The paragraphs themselves are attention-catching as appears from their wording extracted above. It is true, as Google points out, that many searchers will have been looking for another specific webpage or reference and will not have noticed those relating to the Ripoff Report, but a significant proportion of even those searchers are likely to have noticed the paragraphs relating to the first and second Ripoff Report webpages.

[317] Of those searchers who noticed the relevant paragraphs, a significant proportion are likely to have followed the hyperlink to the Ripoff Report webpages themselves for an elaboration of the message conveyed by the paragraphs.

[318] I am satisfied that a substantial number of persons in Australia conducted searches on the Google Australian website for the name "Dr Janice Duffy", read the paragraphs relating to the first and second Ripoff Report webpages and followed the hyperlinks to those webpages.

[319] Google published the first and second Ripoff Report webpages and paragraphs relating to them to a substantial number of users between January and December 2010.

384 As to the next category, "*Janice Duffy*" concerning the *first and second Ripoff Report webpages*, the Judge adopted a similar method of analysis at paragraphs [320] to [323] and concluded:

[324] I am satisfied that a substantial number of persons in Australia conducted searches on the Google Australian website for the name "Janice Duffy", read the paragraphs relating to the first and second Ripoff Report webpages and followed the hyperlinks to those webpages.

[325] Google published the first and second Ripoff Report webpages and paragraphs relating to them to a substantial number of users between January and December 2010.

385 The Judge then, at paragraphs [326] to [345] applied the same methodology to searches using both of the search terms "*Dr Janice Duffy*" and "*Janice Duffy*" concerning a number of categories of other webpages (including the search term "*janice duffy psychic stalker*" as generated by Google's autocomplete function).

386 After examining each category individually, and coming to his separate conclusions as to each publication being proven or not proven, the Judge restated, and drew together, the classes of publication as to which he found proven thus:

[346] Google published the following paragraphs relating to the first and second Ripoff Report webpages to a substantial number of persons who searched on the Google Australian website in Australia for "Dr Janice Duffy" between January 2010 and December 2010:

A Janice Duffy – Psychic Stalker Psychics Beware Of...

Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher ...

www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached

B Rip-off Report Dr Janice Duffy ...

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide, South Australia Adelaide, South Australia

www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm Cached

[347] Google published the following paragraphs relating to the first and second Ripoff Report webpages to a substantial number of persons who searched the Google Australian website in Australia for “Janice Duffy” between January 2010 and December 2010:

C Janice Duffy – Psychic Stalker Psychics Beware Of...

Psychics beware of psychic stalker Janice Duffy...

www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm Cached

D Rip-off Report Dr Janice Duffy

Dr Janice Duffy Stop the Australian Psychic Stalker Dr. Janice Duffy!! Adelaide, South Australia Adelaide, South Australia

www.ripoffreport.com/.../Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-deb8p.htm Cached

[348] Google published the following paragraph relating to the first 123 People webpage to a substantial number of persons who searched on the Google Australian website in Australia for “Dr Janice Duffy” between January 2010 and October 2010:

E Janice Duffy – Email Address, Phone Numbers, Everything!

Dr Janice Duffy Stop the Australian Psychic Stalker Dr Janice Duffy!...

www.123people.com/s/janice+duffy - United States

[349] Google published the following paragraphs relating to the first and second Complaints Board webpages to a substantial number of persons who searched on the Google Australian website in Australia for “Dr Janice Duffy” between January 2010 and October 2011:

F Dr Janice Duffy Senior Researcher

Are you also a victim of the Dr Janice Duffy Senior Researcher? Submit a complaint to help other consumers to be educated and don't let them get away...

www.complaintsboard.com/.../dr-janice-m-duffy-senior-researcher-a55917.html Cached

G Dr Janice Duffy

Are you also a victim of the Dr Janice Duffy? Submit a complaint to help other consumers to be educated and don't let them get away with it!

www.complaintsboard.com/.../dr-janice-duffy-a55921.html Cached

[350] Google published the following webpages to a substantial number of persons searching the Google Australian website in Australia for "Dr Janice Duffy" or "Janice Duffy" between January and December 2010:

H <http://www.Psychic/Janice-Duffy-Psychic/janice-duffy-psychic-stalker-98d93.htm> (the first Ripoff Report webpage);

I <http://www.Psychic/Dr-Janice-Duffy/dr-janice-duffy-stop-the-aust-stalker-deb8p.htm> (the second Ripoff Report webpage).

[351] Google published the following words by its Autocomplete function to a substantial number of persons searching the Google Australian website in Australia for "Janice Duffy" between August 2011 and June 2013:

J janice duffy psychic stalker.

387 I see no error in the Judge's methodology or his conclusions.

THE COMMON LAW QUALIFIED PRIVILEGE BACKGROUND

388 Although not directly involved in the present appeal, common law qualified privilege remains an important background against which analysis of statutory qualified privilege proceeds.

389 In the context of both common law and statutory qualified privilege, there always has been, and always will be, a tension between the desirable goals of protection of reputation and protection of freedom of speech. Common law qualified privilege has traditionally recognised and addressed this tension. In *Horrocks v Lowe*, Lord Diplock stated:²²²

The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue.

²²² [1975] AC 135, 149.

390 In *Roberts v Bass*, Gaudron, McHugh and Gummow JJ described the common law defence of qualified privilege thus:²²³

The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it.²²⁴ Communications made on such occasions are privileged because their making promotes the welfare of society.²²⁵ But the privilege is qualified – hence the name qualified privilege – by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement.

391 However, it is to be borne in mind that statements such as “the welfare of society” or “the interests of society” do not require the Court hearing a particular case to make an assessment of whether the making of the particular defamatory statement in that particular case is in fact for “the welfare or interests of society”. Thus in *Papaconstuntinos v Holmes á Court*, the majority stated:²²⁶

[50] It is commonplace in judgments to find reference made to what was said in *Toogood v Spyring*, concerning the basis for the privilege, by way of conclusion and confirmation that those purposes have been met in a particular case. As was explained in *Aktas v Westpac Banking Corporation*²²⁷ and in *Cush v Dillon*,²²⁸ notions of public policy are the foundation of the privilege. The policy of the law is that freedom of communication may in some circumstances assume more importance than an individual’s right to the protection of his or her reputation. But this may not suggest as necessary a separate test of whether what is said in a particular case is a benefit or disbenefit to society. ...

The nature of the “interest” required for common law qualified privilege

392 Of course, precisely what statements such as “the welfare or interests of society” actually mean will continue to be debated. Thus, in *Bashford v Information Australia (Newsletters) Pty Limited (Bashford)*, Callinan J observed:²²⁹

Expressions which have the ring of slogans and metaphors have been repeatedly used in discussions of qualified privilege. It is important to examine those expressions to reduce them, as far as may be, to concrete terms. ... The phrase “common convenience and welfare of society” rolls readily off the tongue as if it had a fixed meaning that no one could possibly dispute. The desirability of the advancement of the common convenience and welfare of society may readily be accepted. There are bound to be cases however in which what will advance the common convenience and the welfare of society are contestable concepts. Other expressions, such as “the general interest of society”²³⁰ and “community of interest”²³¹ similarly involve the making of value judgments. It is because

²²³ (2002) 212 CLR 1, 26 [62].

²²⁴ *Adam v Ward* [1917] AC 309, 334 (Lord Atkinson).

²²⁵ *Toogood v Spyring* (1834) 1 CM & R 181, 193 [149 ER 1044, 1050] (Parke B).

²²⁶ (2012) 249 CLR 534, 555 (French CJ, Crennan, Kiefel and Bell JJ).

²²⁷ (2010) 241 CLR 79, 89 [22], 108-109 [89]-[94].

²²⁸ (2011) 243 CLR 298, 305 [12].

²²⁹ (2004) 218 CLR 366, 446-447.

²³⁰ *Macintosh v Dun* (1908) 6 CLR 303, 305; [1908] AC 390, 399.

²³¹ *Howe & McColough v Lees* (1910) 11 CLR 361, 369 (Griffith CJ).

the making of any wrong statement cannot possibly be for the common, indeed any good, or in the public, or indeed any narrower interest, that the defence, once the occasion has been shown to be one of qualified privilege, focuses upon the subject matter of the communication, rather than upon the actual communication itself, the inaccuracy of which is the reason why there must be some other basis for its justification if its maker is to be protected against suit.

393 What can confidently be said is that at common law, while a private “interest” of a defendant may be found to prevail over the protection of a plaintiff’s reputation, that will only occur if such “interest” is of a class that is substantial and of some importance. Whether a statement will fall within that class can only be determined after a careful examination of the circumstances of the particular case.

394 Thus in *Howe & McColough v Lees (Howe)*,²³² Higgins J noted that the word ‘interest’ “is used in the broadest popular sense, as when we say that a man is ‘interested’ in knowing a fact – *not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news*”. His Honour considered that such was there established because “When information is given to these men as to the solvency of a buyer, *it is not given to them as idle gossip; it is for solid business uses*”.

395 In similar vein, in *Stephens v West Australian Newspapers Ltd*, Brennan J, in addressing common law qualified privilege, stated:²³³

Mere curiosity in the subject matter of a defamation or a mere avidity for information about the subject is not, without more, sufficient to attract an occasion of qualified privilege, *however widespread the curiosity or avidity for information may be* ((47) *Truth (NZ) Ltd v Holloway* (1960) NZLR 69 at 83; *affd* (1960) 1 WLR 997. In *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 513; see also *Truth (NZ) Ltd v Holloway* (1960) NZLR at 83.) Latham CJ said:

There is ... no principle of law which entitles a newspaper to publish a defamatory statement of fact about an individual merely because the statement is made in the course of dealing with a matter of public interest."

And, in *Lang v Willis* ((1934) 52 CLR 637 at 667.) Dixon J regarded as untenable the proposition “that election speeches made to a large audience of unidentified persons are privileged”. Evatt J was of a similar opinion ((50) *ibid* at 672). *The titillation of calumny is not to be mistaken for the public interest*. In *Webb v Times Publishing Co Ltd* ((51) (1960) 2 QB 535 at 569.) Pearson J said:

One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong in newspapers publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do, there is not in the subject-matter any such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be involved.

²³² (1910) 11 CLR 361, 393, 398.

²³³ (1994) 182 CLR 211, 244.

Hitherto, the protection of personal reputation has weighed – as it should continue to weigh – heavily with the courts in determining whether the public’s interest in the subject matter of a defamatory publication overrides the law’s concern to protect personal reputation. (Emphasis added)

396 More recently, in *Bashford*, Gummow J stated:²³⁴

[139] In determining the existence of privilege in the present case, the words of Dixon J in *Guise v Kouvelis* deserve mention:²³⁵

[T]he very width of the principles governing qualified privilege for defamation makes it more necessary, in deciding how they apply, to make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication.

[140] Hence the caution by Jordan CJ in *Andrejevich v Kosovich*²³⁶ that in order for the defendants in that case to succeed in the defence of qualified privilege:

it was necessary that they should show by evidence that both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter, of such a kind that it was desirable as a matter of public policy, in the general interests of the whole community of New South Wales, that it should be made with impunity, notwithstanding that it was defamatory of a third party.

397 In the present case, the Judge rejected the common law defence of qualified privilege. There is no appeal from that decision, but his Honour’s reasons are nevertheless well worth reproducing:

[400] In the present case, Google published the defamatory words to anyone who chose to use its search engine to search for Dr Duffy’s name. Google’s publication was indiscriminate as to the persons to whom publication might be made and as to the purpose or interest of such persons in making the search enquiry. *While some recipients may have had a legitimate interest in ascertaining specific types of information about Dr Duffy amounting to a sufficient interest for the purpose of qualified privilege, the information provided by Google about Dr Duffy was not confined to any specific type of information nor tailored to the particular interest of such a recipient. Google made the information available to any recipient enquiring out of mere curiosity or for purposes of gossip or worse.*

[401] The publications by Google do not meet the requirement for privileged occasions. The common law defence of qualified privilege fails. (Emphasis added)

398 While there are differences between the “interest” required by common law qualified privilege and that required by s 28 of the Act (to be considered in detail below), his Honour’s italicised observations immediately above concerning the manner of publishing by Google apply equally to both defences. I consider that these remarks are entirely correct. I will return to this aspect below.

²³⁴ (2004) 218 CLR 366, 417.

²³⁵ (1947) 74 CLR 102, 116. See *Baird v Wallace-James* (1916) 85 LJ PC 193, 198; *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, 23.

²³⁶ (1947) 47 SR (NSW) 357, 363.

SECTION 28 OF THE *DEFAMATION ACT 2005*

399 Turning to statutory qualified privilege, s 28 of the Act provides as follows:²³⁷

28—Defence of qualified privilege for provision of certain information

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the *recipient*) if the defendant proves that—
 - (a) the recipient has an interest or apparent interest in having information on some subject; and
 - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—
 - (a) the extent to which the matter published is of public interest; and
 - (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
 - (c) the seriousness of any defamatory imputation carried by the matter published; and
 - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
 - (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
 - (f) the nature of the business environment in which the defendant operates; and
 - (g) the sources of the information in the matter published and the integrity of those sources; and
 - (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

²³⁷ Virtually identical provisions appear in the respective Defamation Acts in all Australian jurisdictions. See: *Defamation Act 2005* (NSW) s 30; *Defamation Act 2005* (Vic) s 30; *Defamation Act 2005* (Qld) s 30; *Defamation Act 2005* (WA) s 30; *Defamation Act 2005* (Tas) s 30; *Defamation Act 2006* (NT) s 2; *Civil Law (Wrongs) Act 2002* (ACT) s 139A.

- (i) any other steps taken to verify the information in the matter published; and
 - (j) any other circumstances that the court considers relevant.
- (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
- (5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

Section 28(1)(a) & (b): The Google approach

400 Turning first to s 28(1)(a) & (b), Google contends that if any person enters a search term containing the name of the plaintiff, that person thereby creates an “interest or apparent interest in having information on some subject” (the subject being “the plaintiff”) and thereby creates an occasion of qualified privilege which protects Google in publishing any defamatory matter concerning the plaintiff, on the basis that it is published “in the course of giving to the recipient information on that subject” (ie “the plaintiff”). Thus in the defendant’s outline of argument on the appeal it was stated:

[51] Section 28 of the Act protects the publication of a defamatory matter ‘in the course of giving information on’ the subject in which the recipient has ‘an interest or apparent interest’. The concepts of ‘interest or apparent interest’ and ‘information’ are not to be narrowly defined. *A person who makes a query as specific as ‘Janice Duffy’ has an interest (or apparent interest) in being presented with a set of search results of webpages published on the web that textually match the search terms ‘Janice’ and ‘Duffy’.* That person would not conduct the search if it were otherwise. *If any of those search results was defamatory, its publication occurred in the protected context of giving information.* The position is a fortiori, if the person, based on the information conveyed by the snippet and his/her original interest in entering the search, determines to navigate the hyperlink to the underlying webpage. Authorities: *Austin v Mirror Newspapers* [1986] 2 WLR 57; *Rogers v Nationwide News* (2003) 216 CLR 327, [2003] HCA 52. (Emphasis added)

401 I consider that Google’s contention is deeply flawed. In effect, it seeks to write s 28(1)(a) and (b) out of the Act. It ignores matters such as: first, the preservation of balance between freedom of reputation and freedom of speech by requiring a specific “interest” in a subject which the law considers worthy of being the subject of qualified privilege as distinct from merely being curious; and second, the fact that the s 28(1)(b) requirement “in the course of giving to the recipient information on that subject” cannot be sensibly assessed unless it is first known what is “the subject”.

402 I turn to the correct construction and application of s 28(1)(a) & (b).

Section 28(1)(a) & (b): The requirement of an interest or apparent interest in having information on the subject matter in question

403 The s 28(1) requirement is here framed as being an interest or apparent interest in having information “on the subject matter in question” in the terms

used by *Tobin & Sexton*.²³⁸ The words “on the subject matter in question” are apt, for they recognise that the statutory words “information on some subject” *do not* mean “any subject” but rather that particularisation of the precise subject matter in question is required.

404 I also gratefully adopt the authors’ next following remarks thus:²³⁹

The crucial factor in relation to this requirement is the “subject” referred to by the section. The nature of the subject will determine whether, in the court’s view, the recipient has an interest in having information concerning that subject. This will also be true if the defendant reasonably acts on the basis that the recipient has an “apparent interest”, for s 22(3) provides an essentially objective test for the defendant’s belief: a recipient has an apparent interest in having information on a subject if, but only if, the publisher acts on a reasonable basis that that person has that interest.

405 To use my own words, the word “subject” in s 28(1)(a) serves two purposes. First, the words “on some subject” furnish the way in which the preceding words “an interest or apparent interest in having information” will be delineated in a particular case. Secondly, the word “subject” forms an essential bridge between s 28(1)(a) and s 28(1)(b) in that the words “that subject” in the latter sub-section refer back to the same particular subject referred to in the former.

406 Thus, in relation to s 28(1)(a) & (b), there are two requirements for the defendant to satisfy.²⁴⁰ The first requirement, under s 28(1)(a), is to delineate both “the subject” and “the interest (or apparent interest) in having information on that subject”. As McHugh J in *Bashford* observed:²⁴¹

[58] ... The court cannot determine these issues of duty and interest without characterising the subject matter of the defamation. It cannot judge whether the particular duty and interest are so necessary for the proper functioning of society that the occasion should be privileged - despite the harm that the communication may cause - unless it knows what is the nature of the defamatory communication that allegedly gives rise to the duty and interest.

407 The second requirement, under s 28(1)(b), is to establish that the particular defamatory matter under consideration was published to the recipient “in the course of giving to the recipient information on that subject”. I turn to consider those two requirements.

²³⁸ [14,094].

²³⁹ [14,094].

²⁴⁰ If the defendant fails in satisfying the first requirement, it may be unnecessary to proceed further.

²⁴¹ (2004) 218 CLR 366, 388.

The defendant's first requirement – to delineate the “subject” and “interest” asserted

- 408 In *Telegraph Newspaper v Bedford*, Evatt J (with whom Rich and McTiernan JJ concurred) stated in relation to an analogous Code provision rather than common law qualified privilege:²⁴²

The cases to which I have already referred show that the word “interest,” used in such a connection, means something much more than mere curiosity as to the private business or affairs of other persons. *No doubt it was “interesting” to some readers of the newspaper to have it suggested that the plaintiff was guilty of very improper conduct as a director of the affairs of the Company. But the “interest” to which the sub-section refers is a real and direct personal, trade, business or social concern.* Here there was a complete absence of any such concern on the part of the newspaper readers in the subject of the internal management of the Cracow Mining Company. (Emphasis added)

- 409 In *Morosi v Mirror Newspapers Ltd*, the New South Wales Court of Appeal was concerned to differentiate between common law qualified privilege and statutory qualified privilege. In doing so, and with specific reference to statutory qualified privilege, their Honours stated:²⁴³

The limited application of the common law principles of qualified privilege to publications in newspapers has already been discussed. Section 22 was designed to enlarge the protection afforded by these principles to defamatory publications generally, and it has a particular relevance to publications in newspapers; but it gives no carte blanche to newspapers to publish defamatory matter because the public has an interest in receiving information on the relevant subject. What the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles of privilege require to be established.

- 410 Later, in *Barbaro v Amalgamated Television Services Pty Ltd*, Hunt J, again with specific reference to statutory qualified privilege, said:²⁴⁴

... The word ‘interest’ is not used in any technical sense; it is used in the broadest popular sense, to connote that *the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news.* (Emphasis added)

- 411 Before the Privy Council in *Austin v Mirror Newspapers Ltd*, the appellant contended for a narrow construction that “would equate ‘an interest’ with that type of interest which is usually looked for as an ingredient of the defence of qualified privilege at common law, that is to say, an interest material to the

²⁴² (1934) 50 CLR 632, 662. The relevant part of the Code there under consideration was reproduced by Evatt J at 650 thus: “The two main defences relied upon by the defendant were based upon s 377(3) and s 377 (5) of the Code. Section 377 provides that:

... it is a lawful excuse for the publication of defamatory matter ...

(3) If the publication is made in good faith for ... the public good ...

(5) If the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such **an interest** in knowing the truth as to make his conduct in making the publication reasonable under the circumstances.”

²⁴³ [1977] 2 NSWLR 749, 797.

²⁴⁴ (1985) 1 NSWLR 30, 40.

affairs of the recipient of the information such as would for instance assist in the making of an important decision or the determining of a particular course of action”.²⁴⁵

412 Their Lordships rejected that submission, but in doing so, went to the trouble of reproducing the same two excerpts from *Morosi* and *Barbaro* reproduced immediately above. After doing so, their Lordships stated:²⁴⁶

Bearing in mind that this Act was clearly intended to widen the scope of the common law defence of qualified privilege, their Lordships see no reason to differ from the wider construction adopted by the courts in New South Wales and, applying this construction, accept the view of both the trial judge and the Court of Appeal that the readership of this daily newspaper had an interest in the performance and training of the Manly Rugby Football Club F within the meaning of s 22(1)(a).

413 It is obvious that “the wider construction being adopted by the courts in New South Wales” referred to by the Privy Council was that adumbrated in *Morosi* and *Barbaro*; it was a construction wider than that submitted for by the appellant’s in *Austin*, but it was nevertheless subject to the italicised caveat in the excerpt from *Barbaro* reproduced above with approval by their Lordships.

414 The New South Wales Courts have continued to adopt that approach. Thus in *Echo Publications v Tucker (No 3)*, Hodgson JA (with whom Mason P and McColl JA concurred) reproduced the passage from *Barbaro* and stated: “That approach was supported by the Privy Council in *Austin v Mirror Newspapers Ltd.*”²⁴⁷ Hodgson JA proceeded to reproduce the passage from the advice of the Privy Council which is reproduced above.²⁴⁸

415 More recently, in this Court in *Stone v Moore*, Doyle J (with whom Kourakis CJ and Stanley J agreed), described the requisite interest as follows:²⁴⁹

[114] The intention of the statutory definition of qualified privilege is to broaden the nature of the interest which will found a defence relative to the common law. The focus

²⁴⁵ [1986] 1 AC 299, 311.

²⁴⁶ [1986] 1 AC 299, 312.

²⁴⁷ [2007] NSWCA 320, [7], [8].

²⁴⁸ In *Griffith v ABC* [2010] NSWCA 257, Hodgson JA (with whom Basten JA and McClellan CJ at CL concurred) reproduced the above passage in *Echo Publications v Tucker (No 3)* with approval at [103]. His Honour observed at [104], in no way inconsistently with *Echo Publications*: “Thus in my opinion there is a clear distinction drawn between the interest in a recipient which is required for the purposes of common law qualified privilege, and the interest (or apparent interest) which is required under s 22(1) (a), the latter being a substantially wider sense.”

Similarly, in *Restifa v Pallotta* [2009] NSWSC 958, [46], McCallum J stated: “In either case (at common law or under s 30), it is an element of the defence that the recipient has an interest or an apparent interest in having information on the relevant subject. The word “interest” in reference to the recipient is used “in the broadest popular sense” but it is not enough to establish interest as a matter of gossip or curiosity. The recipients must have an interest in the information “as a matter of substance apart from its mere quality as news”: *Bashford* [148], Gummow J, citing *Howe & McColough v Lees* [1910] HCA 67; (1910) 11 CLR 361, 398.

²⁴⁹ [2016] SASCF 50, [114].

is on the interest of the recipient rather than a reciprocity or community of interests. Again, the concept of interest is not to be narrowly or technically construed. It is used in the broader, popular sense of a matter of substance in which the relevant audience might legitimately have an interest in knowing, *as long as that interest goes beyond being a matter of curiosity or prurient interest. The interest or apparent interest may be direct or indirect, but it must nevertheless be definite or tangible, and not vague or insubstantial.*²⁵⁰ (Emphasis added)

416 As an illustration of the requirement of distinguishing the requisite “interest” from “mere curiosity” or “mere news”, one may refer to the judgment of the New South Wales Court of Appeal in *Chappell v TCN Channel Nine P/L*. The plaintiff had been accused in a newspaper article of adultery and of performing unusual sexual activities. In granting his application for an injunction, Hunt J stated:²⁵¹

The first of the defendant’s submissions was based upon the undoubted fact that the plaintiff is a public figure ...

I could see no real ground for supposing that the defendant might succeed in relation to this submission. In my view, unless the public figure makes his private activity a matter of public interest himself (a proposition which I discuss later), that private activity can be a matter of public interest only if it has some bearing upon his capacity to perform his public activities ...

The defendant then asserted that this material relating to the plaintiff’s private activities does indeed affect the performance of his public activities. ... I found that submission to be similarly lacking in merit. ...

A defence of statutory qualified privilege ... would necessarily fail ... there is no interest in the viewers of the defendant’s programme in having information concerning the plaintiff’s infidelity in fact, and concerning his participation in fact in sexual activities of an unusual nature, beyond curiosity or its mere quality of news: Barbaro v Amalgamated Television Services Pty Ltd (1985) 1 NSWLR 30 at 40 and Austin v Mirror Newspapers Ltd (1985) 3 NSWLR 354 at 359; 60 ALJR 3 at 6; 63 ALR 149 at 154. (Emphasis added)

The defendant’s second requirement – “in the course of giving to the recipient information on that subject”

417 The defendant’s second requirement, under s 28(1)(b), is to prove that the particular defamatory matter under consideration was published to the recipient “in the course of giving to the recipient information on that subject”.

418 As Doyle J observed, with respect correctly, in *Stone v Moore*, s 28(1)(b) “resembles the common law requirement that the publication be relevant or pertinent to the occasion of privilege”.²⁵² I will first say something about the position at common law and then directly address s 28(1)(b).

²⁵⁰ *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30, 40; *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354, 359.

²⁵¹ (1988) 14 NSWLR 153, 165-171.

²⁵² [2016] SASFC 50, [116].

A question of “relevance” at common law

419 It is now clearly recognised that, quite apart from a separate issue of malice (as to which the burden is on the plaintiff), it is part of the defendant’s burden to establish “relevance”. This requirement may be referred to in differing terminology such as “relevant”, “germane”, “pertinent”, “sufficient connection”, the eschewing of “the extraneous” and so forth.²⁵³ In 2011 in *Sands v State of South Australia*, I stated:²⁵⁴

[75] ... it has for some time been the preferable view in Australia that the plaintiff *may* challenge portion of a publication as simply being insufficiently connected to a privileged occasion and, if that challenge is successful, will have no need to resort to an argument about malice. I consider that that approach is to be clearly seen, although expressed in differing terms, in the various judgments in *Adam v Ward*.²⁵⁵

[76] I respectfully agree with the comments in *Gatley*²⁵⁶ wherein the learned editor reproduces [a portion of] ... the judgment of Lord Diplock in *Horrocks v Lowe* and then observes:

On the face of it, this amounts to saying that even irrelevant matter does not fall outside the privilege (which would be a question for the judge), but can only be evidence of malice (a question for the jury); or that the test of irrelevance is not “objective” but “subjective”, which in practical terms has much the same effect because it would blur the boundaries between irrelevance and malice. This is difficult to reconcile with the clear terms of four of the five judgments in *Adam v Ward* and even Lord Dunedin, upon whom Lord Diplock relies, admitted that:

If the defamatory statement is quite unconnected with and irrelevant to the main statement which is *ex hypothesi* privileged, then I think it is more accurate to say that the privilege does not extend thereto, than to say, though the result may be the same, that the defamatory statement is evidence of malice.

[77] Further, it seems clear that the preponderance of recent Australian authority, including statements by members of the High Court in *Bellino v Australian Broadcasting Corporation*²⁵⁷ and in *Bashford v Information Australia (Newsletters) Pty Ltd*,²⁵⁸ has favoured that approach.

[78] The correctness of that approach now appears to have been specifically confirmed by the recent decision of the High Court in *Cush v Dillon*.²⁵⁹ ...

[79] Their Honours [French CJ, Crennan and Kiefel JJ] then appear to settle the question of whether the defence of qualified privilege was subject to a condition that the words must be relevant to the occasion of the duty or that an allegation of irrelevance was to be

²⁵³ One also finds terms such as “fairly warranted” and “germane and reasonably appropriate” to which I return a little later.

²⁵⁴ [2011] SASCF 146.

²⁵⁵ [1917] AC 309.

²⁵⁶ Clement Gatley, *Gatley on Libel and Slander* (Sweet & Maxwell, 11th ed, 2008) [14.60].

²⁵⁷ (1996) 185 CLR 183, 201-205 (Brennan CJ); 226-228 (Dawson, McHugh & Gummow JJ); 246-247 (Gaudron J).

²⁵⁸ (2004) 218 CLR 366, 378-379 (Gleeson CJ, Hayne and Heydon JJ); 415; 421 (Gummow J); 434-436 (Kirby J).

²⁵⁹ (2011) 85 ALJR 865.

dealt with under the matter of malice by accepting Gatley's view of the decision in *Adams v Ward*.²⁶⁰ Their Honours stated:²⁶¹

[19] *Adam v Ward* confirms that there may be limits to what may be said upon a subject on an occasion of qualified privilege and that those limits are to be tested by the connection of the statement to the subject. ...

[80] Their Honours refer to various formulations by the members of the Court in *Adam v Ward*²⁶² (which as observed above, differ at least in emphasis) without indicating a preference as between them. Their Honours later explain:²⁶³

[22] It is not necessary to determine whether the descriptions given of irrelevant material in *Adam v Ward* vary as to the stringency with which relevance ought to be tested. The passage from *Toogood v Spyring* suggests that no narrow view should be taken of the pursuit of a duty or interest in what was said. To do so may unduly restrict the operation of the defence. ... (Footnote omitted)

[81] What is made very clear by their Honours is that there must usually be an enquiry as to whether the boundaries of the occasion have been exceeded and such would certainly be necessary in the present case. Thus their Honours stated:²⁶⁴

[25] The enquiry which precedes that of actual malice is undertaken in order to determine the boundaries of the privilege, by reference to the duty or interest which gave rise to it. It may be said to involve an objective assessment. It is not to be confused with an enquiry as to whether a person was actuated by malice in using exaggerated words. As Earl Loreburn observed in *Adam v Ward*, a statement which exceeds the occasion may be evidence of malice, but "the two things are different".

420 In the present case it is necessary to expand upon that analysis a little.

The common law requirement that the defamatory matter be reasonably appropriate to the circumstances of the particular case

421 In *Adam v Ward*, Earl Loreburn stated:²⁶⁵

But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

422 Thus far, his Lordship's words address relevance. However, what immediately follows introduces an additional requirement that the publication of the defamatory matter must be "reasonably appropriate to the occasion":²⁶⁶

²⁶⁰ [1917] AC 309.

²⁶¹ (2011) 85 ALJR 865, 870.

²⁶² [1917] AC 309.

²⁶³ *Cush v Dillon* (2011) 85 ALJR 865, 870.

²⁶⁴ *Ibid* 871.

²⁶⁵ [1917] AC 309, 320-321.

²⁶⁶ [1917] AC 309, 321.

To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and *reasonably appropriate to the occasion*, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact publishes it. All of this is for the judge alone, and the question of malice, which is for the jury, cannot arise till the judge has ruled on the whole question of privilege.

Language has been used in some cases which seems somewhat to confuse the two separate points, namely, whether the defendant has gone beyond the privilege which the occasion creates, and whether the defendant has forfeited the privilege by malice. Excess of privilege in part of a defamatory publication may of course be evidence of malice as to the whole of it, but the two things are different. (Emphasis added)

423 The words “reasonably appropriate to the occasion” are here used in the sense of proportionate to the occasion. I consider that such “proportionality” is accepted in Australia as a requirement of the common law defence of common law privilege.

424 In *Howe*, Griffith CJ adumbrated the principle upon which a statement may be protected by the defence of qualified privilege, namely the protection of communications for the common convenience and welfare of society. His Honour stated:²⁶⁷

The words “some social or moral duty” and “on the ground of an interest in the party making or receiving it” have been sometimes taken as laying down a sharp line of demarcation between what is spoken of as “duty” and what is spoken of as “interest.” But when the real principle on which the rule is founded is understood it becomes apparent that the two matters often overlap. The words of Parke B in *Toogood v Spyring*:—“If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society”—supply the key. *The reference to society does not mean that the person who makes the communication is under any obligation to publish, and is justified in publishing, it to the public at large, but that the interests of society in general require that a communication made under such circumstances to the particular person should be protected.* The term “moral duty” is not used in a sense implying that a man who failed to make the communication under the circumstances would necessarily be regarded by his fellows as open to censure, but in the sense implying that it was made on an occasion on which a man who desired to do his duty to his neighbour would reasonably believe that he ought to make it. It is obviously impossible to lay down *a priori* an exhaustive list of such occasions. The rule being founded upon the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions. (Emphasis added)

425 It is to be noted that his Honour was careful to stress that while the reference to “society” did not mean that the defendant had to establish an obligation to make the statement to the public, of equal importance the reference

²⁶⁷ (1910) 11 CLR 361, 368-369.

to “society” did *not* mean that the defendant *was justified in publishing it to the public at large*. His Honour continued that “the interests of society in general require that a communication made under such circumstances *to the particular person* should be protected”²⁶⁸ (emphasis added).

426 In similar vein, in 1947 in *Andreyevich v Kosovich*,²⁶⁹ Jordan CJ said:

If, at the trial of a defamation action, facts are established which satisfy the Judge that the occasion of the publication complained of was one of qualified privilege, the defendant is entitled to a verdict, *save to the extent to which it appears to the Judge that the defamatory matter exceeded what was reasonably incidental to the legitimate purposes of the occasion, or that its publication was wider than was reasonably proper to serve those purposes*, or (if, in the opinion of the Judge, there is evidence of express malice) unless it is established by the plaintiff to the satisfaction of the jury that the defamatory statement was animated by express malice. (Emphasis added)

427 The central case of *Guise v Kouvelis*²⁷⁰ was also decided by the High Court in 1947, but after the handing down of the decision in *Andreyevich*.²⁷¹ In *Guise v Kouvelis*, the plaintiff succeeded because the majority considered that the defendant’s act of shouting out “You’re a crook” in the gambling house, in the hearing of members and non-members, was disproportionate in that, in all of the circumstances, the relevant interest or duty did not fairly warrant the public broadcasting inside the club that was actually made. Latham CJ (with whom McTiernan and Williams JJ agreed) stated:²⁷²

But the defendant and other members of the club—and possibly also other persons who frequented the club as visitors—had an interest in the character of the persons whom they were likely to meet there. *The question is whether such an interest warrants a broadcasting in the club* of any belief, if honestly held, as to the bad character of a person who happens to be in the club and who may come there again. The defendant could have told the plaintiff, without making any defamatory allegation, that he would report his conduct to the committee. If the defendant had then, honestly believing that the plaintiff

²⁶⁸ In *Aktas v Westpac Banking Corporation Limited* [2010] HCA 47, Kiefel J (as her Honour then was) stated: “[97]. In *Howe & McColough v Lees* Griffith CJ said that there will often be an overlap between a statement made in the discharge of some social or moral duty and the interest a party has in making or receiving the statement. This is apparent when consideration is given to the principle upon which the defence is founded – the protection of communications for the common convenience and welfare of society. But the reference to “society” does not mean, for the defence to apply, that the person making the communication was under an obligation to make it, nor does it mean that the person was entitled to make it to the public at large. The point, his Honour said, is that “the interests of society in general require that a communication made under such circumstances to the particular person should be protected.” In a case such as the present, the interests of society are in the making of statements in the ordinary course of business, albeit that they may contain defamatory imputations.”

²⁶⁹ (1947) 47 SR (NSW) 357, 361-362.

²⁷⁰ (1947) 74 CLR 102.

²⁷¹ In *Aktas v Westpac Banking Corporation Limited* [2010] HCA 25, [31] and footnote 32, the majority state that an appeal to the High Court (Latham CJ, Rich, Starke, McTiernan and Williams JJ) against the judgment in *Andreyevich v Kosovich* was dismissed for short reasons given orally by Latham CJ in *Kosovich v Andreyevich* unreported, High Court of Australia, 23 April 1947. (This date fell between the argument and reservation of judgment in *Guise* on 1 April 1947 and the delivery of judgment in *Guise* on 8 May 1947).

²⁷² (1947) 74 CLR 102, 112.

was a crook, said so to the committee, the common interests of the members of the club, and even of potential visitors, would have been adequately protected—so far as it rested upon the defendant, either as a matter of duty or as a matter of interest, to protect them.

The persons to whom the statement was made, whether members or visitors, must, I think (in the absence of evidence to the contrary), be taken to have included individuals who might never have anything to do with the plaintiff, except, in the case of members, in having a common membership of the club. *I can see no justification for holding that the interests of the defendant or of the members of the club or any social or other duty fairly warranted the public statement which was actually made.* The basis of the privilege in question is social welfare and I am not prepared to hold that it is conducive to social welfare to lay down a rule that a member of a club who is doubtful of the honesty, or is satisfied of the dishonesty, of another person who is in the club on a particular occasion is privileged in expressing his opinion to members of the club in general. (Emphasis added)

428 Dixon J (as he then was) dissented and found for the defendant. However, it is evident that his Honour also accepted the proportionality approach. Thus his Honour stated:²⁷³

The primary question for the Court is whether the occasion is privileged. If the occasion is privileged other questions may arise and it is possible that they may be, or comprise, matter of law for the Court, though it is more likely that they will be questions of fact for the jury. The question whether the defamatory matter is or may be relevant to the occasion may arise in a form which the Court must decide. ... Whether or not the occasion gives a privilege is a question of law for the judge, but whether the party has *fairly and properly conducted himself in the exercise of it* is a question for the jury: per Lord Campbell CJ in *Dickson v Earl of Wilton*. ... (Emphasis added)

429 That this is so is confirmed by the judgment of French CJ, Hayne and Heydon JJ in *Bashford*. Their Honours referred to the above passage in *Guise v Kouvelis* and approved of the use of the “fairly and properly conducted himself in the exercise of [the privilege]” approach, stating:²⁷⁴

[22] Qualified privilege gives no licence to defame. It denies the inference of malice that ordinarily follows from showing that false and injurious words have been published. If the occasion is privileged *the further question which arises is whether the defendant “has fairly and properly conducted himself in the exercise of it”* (footnote: *Guise v Kouvelis* (1947) 74 CLR 102 at 117 per Dixon J quoting *Dickson v Earl of Wilton* (1859) 1 F & F 419 at 426 per Lord Campbell CJ [175 ER 790 at 793]). (Emphasis added)

430 In *Bashford*, McHugh J used the term “fairly and reasonably relevant”. Thus his Honour stated:²⁷⁵

[69] A common case of a moral or social duty in this context is the duty to answer a request by a potential employer for information concerning the character, capacity or honesty of an employee.²⁷⁶ When such a request is made, the common law recognises a duty in the recipient of the request to answer the enquiry and to state fully and honestly

²⁷³ (1947) 74 CLR 102, 117.

²⁷⁴ (2004) 218 CLR 366.

²⁷⁵ (2004) 218 CLR 366, 377.

²⁷⁶ *Hodgson v Scarlett* (1818) 1 B & Ald 232, 239-240 [106 ER 86, 88]; *Mead v Hughes* (1891) 7 TLR 291.

all that he or she believes that he or she knows about the employee that is relevant to the enquiry. The answer cannot be used as a licence to defame the employee. It must be fairly and reasonably relevant to the enquiry. If the employer is asked whether the employee is fit to be employed as a gardener, it is unlikely that the occasion of privilege would extend to details about the employee's convictions for negligent driving.

431 Kirby J also approved the proportionality approach and stated:²⁷⁷

[192] Simply because, in a general sense, the publication of matter defamatory of an individual is included in a context of discussion of a subject of public interest on which there is the requisite reciprocity of interest and duty, does not assure the imputation of protection. Were it so, a great many grievous wrongs to the reputation of individuals would be privileged against redress simply because of a tenuous, remote or contrived connection between the defamatory imputation and the context. The introduction into a privileged communication of extraneous defamatory imputations will not necessarily cloak them with the privilege. The problem remains one of drawing a line between the protected and the unprotected.

[193] Various judicial formulae have been propounded to mark out the boundaries of the protection given by the relevant privilege. ...

[194] All of these formulae are attempts to define the boundaries of a discussion that is truly within the scope of the matter of public interest, so as to exclude the introduction of extraneous, irrelevant or marginal and gratuitous imputations that unacceptably do harm to the reputation and honour of an individual. Scientific precision is impossible by the use of such formulae. ...

432 Callinan J adopted the "germane and reasonably appropriate" terminology²⁷⁸ and stated:

[235] Everything to which I have referred highlights the importance of identifying, and doing so with some degree of precision, the relevant subject matter. It is equally important to make sure that the inaccurate and defamatory matter in respect of which the defence is advanced is not extraneous to that subject matter and is, to adopt the words of each of Sheller and Hodgson JJA respectively in the Court of Appeal in this case which I am content to do, "sufficiently connected" and "germane and reasonably appropriate" to it. A slight, or general, ill-defined connexion will not suffice.

...

[237] Again, what is or is not relevant or germane is not a matter upon which all minds will always agree. But because the communication of inaccurate matter can hardly be in the true interest of anyone, matters of the most attenuated relevance only to the subject matter, need to be carefully scrutinized and should be rejected as being outside the occasion of qualified privilege.

The correct construction of section 28(1)(b)

433 Returning now to s 28(1)(b), the matters of relevance and proportionality arise in the context of the requirement that "the matter is published to the

²⁷⁷ (2004) 218 CLR 366, 391.

²⁷⁸ Its origin seems to be the passage in the judgment of Earl Loreburn in *Adams v Ward* reproduced above.

recipient *in the course of* giving to the recipient information on that subject”. Section 28(1)(b) “effectively confines the defendant in a claim for qualified privilege to material conveying information on the subject already identified under (s 28(1)(a)) as being one in which the recipients have an interest or apparent interest”.²⁷⁹

434 The critical consideration is that the mere fact that the defamatory matter was published *at the same time as* words giving readers information about the relevant subject is not sufficient; the defamatory matter must be published *in the course of* giving readers information about the relevant subject.

435 Thus in *Rogers v Nationwide News*²⁸⁰ the defendant published an article reporting on the amount by which the Australian Tax Office had taxed a damages award which a patient had been awarded against a surgeon following an unsuccessful operation. It reported that she was blinded by the surgeon’s negligence, whereas in fact the damages were awarded for failure to warn fully of the risks associated with the operation.²⁸¹ Hayne J agreed with the trial Judge that s 22(1)(b)²⁸² was not satisfied, and explained:²⁸³

Her Honour held that those to whom the respondent published its newspaper had an interest or apparent interest in having information about the conduct of the Australian Taxation Office in assessing taxation on part of the sums awarded as damages for personal injury. If that is right, and I need not consider what is meant in s 22(1)(a) by “interest or apparent interest”, the primary judge was nevertheless right to conclude that other requirements for the application of s 22 were not met...

The matter published included words conveying the imputation that the appellant had blinded Mrs Whitaker “by negligently and carelessly carrying out an eye operation on her”. *No doubt the words conveying that imputation were published at the same time as words giving readers information about what the Australian Taxation Office had done. But the words which conveyed that imputation were not published in the course of giving readers information about the relevant subject.* How Mrs Whitaker had become blind, and what claim she had had against the appellant, were not the subject in which readers may have had a relevant interest. That subject concerned what the Australian Taxation Office had done, not what the appellant had done. What was said about the appellant’s conduct was not sufficiently connected with the subject that may have been of interest to fall within s 22(1)(b). (Emphasis added)

436 The approach of Hayne J to the statutory defence very much accords with the approach in the older decisions on the same provision. Thus in *Wright v Australian Broadcasting Commission*, the defendant published an article asserting that the plaintiff, a Liberal Senator, voted in a secret ballot against his own party’s nomination for president of the senate and was a “rat” for doing so.

²⁷⁹ Tobin & Sexton [14,094].

²⁸⁰ (2003) 216 CLR 327.

²⁸¹ *Ibid*, 332.

²⁸² The equivalent to s 28 in the New South Wales Act.

²⁸³ (2003) 216 CLR 327, 346-347. Gleeson CJ, Gummow and Callinan JJ did not consider s 22(1)(b) separately, rather holding that the defence failed due to the unreasonable conduct of the respondent. Heydon J considered the trial Judge “correct for the reasons she gave” (at 379).

The plaintiff sued on the basis that this accused him of being disloyal and being a rat. The defendant sought to rely on statutory qualified privilege on the basis that the recipients of the publication had an apparent interest in the discussion of public affairs, including the government of Australia and the election of the President of the Senate of Australia. Reynolds JA (with whom Glass JA agreed) found that the defamatory matter was not relevant to the occasion of qualified privilege relied upon by the defendant. His Honour stated:²⁸⁴

It cannot be denied that the recipient, in this case the general public, had an interest in having information on the subject of public affairs, and the subject of the election of a senator to the important post of President of the Senate. *It remained a question, however, as to whether the defamatory matter was published in the course of giving to the public information on that subject.*

I have come to the view that a fair reading of the matter published indicates that the subject was no more than a speculation in the nature of titillating gossip as to how the plaintiff had cast his vote in a secret ballot ... The whole statement presupposed knowledge on the part of the viewers of the election result. *I am quite unable to find what I conceive to be a necessary connection between the subject to which the defendants point and the defamatory matter.* It cannot be doubted that protection is not afforded to an irrelevant defamatory statement, merely because it is made in the course of giving information on the subject in question. But even if this view is wrong, it could hardly be reasonable under the section to make an irrelevant defamatory statement, a matter to which I will turn later.

It seems to me that the only subject dealt with was how individual senators voted in secret ballot. In having information on that subject the general public has no legitimate interest, and this the defendants tacitly acknowledged by pointing to a wider subject in an attempt to come under the umbrella it would erect. (Emphasis added)

437 In the later decision in *Barbaro v Amalgamated Television Services P/L*, Hunt J stated:²⁸⁵

Section 22(1)(b) requires a finding that the matter (that is, the imputations concerning the plaintiff: *Wright v Australian Broadcasting Commission* (at 711)) was published to those recipients *in the course of giving to them information* upon that situation at Griffith. That the imputations are, according to the plaintiff's evidence, untrue does not affect this issue. The whole defence of qualified privilege proceeds upon the basis that the defendant was honestly mistaken in relation to what it published. ... *But the imputations concerning the plaintiff must be relevant to the information given by the defendant to those recipients: Wright v Australian Broadcasting Commission* (at 712); *Austin v Mirror Newspapers Ltd* (at 390-391); as is required at common law: *Adam v Ward* (at 319, 326-327, 329, 342, 348). ... (Emphasis added)

THE APPLICATION OF THE PRINCIPLES TO THE PRESENT FACTS

438 I address only s 28(1)(a) and (b) for the moment; the additional requirement for the defendant to establish reasonableness under s 28(1)(c) is dealt with below.

²⁸⁴ [1977] 1 NSWLR 697, 711.

²⁸⁵ (1985) 1 NSWLR 30, 41.

The onus of proof is on the defendant

439 As is obvious from the terms of the section, a defence of statutory qualified privilege will be established *if, and only if, the defendant pleads and proves* all of the three conditions in s 28(1) paragraphs (a), (b) and (c) respectively.²⁸⁶ As *Tobin & Sexton*, without undue wordiness, state at [14,085]:

It is for the defendant to prove the facts on which a Judge may find that the defamatory material was published on an occasion of qualified privilege.

440 The law has always been clear concerning two presently pertinent matters. First, a plaintiff may prove, by the use of circumstantial evidence, that there was publication to a substantial number of persons whose identities are unknown.²⁸⁷ Second, that an affirmative defence such as qualified privilege only arises for consideration *after* the plaintiff has proven requisite publication. Thus in *Bashford*, Gummow J stated:²⁸⁸

[135] ... The defence of qualified privilege is a plea in confession and, as such, is predicated upon the existence of a defamatory imputation to which the privilege attaches. To speak of qualified privilege attaching to a non-defamatory statement is to ignore this fundamental characteristic. ...

And McHugh J there stated:²⁸⁹

[58] ... A plea that defamatory matter was published on an occasion of qualified privilege is a plea of confession and avoidance. It accepts that the communication is defamatory, that the defamatory matter may be false and that its publication has caused or may cause harm to the plaintiff. It confesses the publication of defamatory matter, but contends that the publication is immune from liability because the public interest requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation. ...

The three publications to Ms Palumbo

441 As to the first publication to Ms Palumbo, while she had an interest in receiving material concerning smoking, she had no interest in receiving the defamatory material that was foisted upon her. Irrespective of the onus of proof, it is simply not the case that the defamatory matter was published to the recipient *in the course of* giving to the recipient information *on that subject* (ie smoking) and accordingly the requirement in s 28 (1)(b) is not satisfied.

²⁸⁶ The onus has most often been referred to in the context of the defendant's requirement to prove reasonableness. Thus Hunt J in *Chappell v TCN Channel Nine P/L*, (1988) 14 NSWLR 153, 170 observed: "The defendant at the trial must establish that its conduct in publishing *the plaintiff's* imputations was reasonable in the circumstances. See also *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 704-705 and *Barbaro v Amalgamated Television Services Pty Ltd* (42, 43-44)." The requirement to prove reasonableness is further considered below.

²⁸⁷ If there be an additional legal requirement of proof of one identified person, that is here satisfied by the proven publications to Ms Palumbo.

²⁸⁸ (2004) 218 CLR 366, 415-416.

²⁸⁹ *Ibid*, 387-388.

442 As to the second and third publications, qualified privilege did not apply for
that same reason and, in addition, for the anterior reason that the searches on both
occasions were made from curiosity alone and no *subject* within the meaning of
s 28 was established.

The publications to the substantial number of unknown publishees

443 I understand Google to submit that, since the Judge did not determine the
identities of each member of the class of “a substantial number of persons
unknown”, it should be taken to be part of the plaintiff’s task in proving
publication to also prove that that class did not consist entirely of persons with an
“interest” in the contretemps between the plaintiff and the so-called psychics.

444 There are a number of answers, on a number of levels, to this submission.

445 First and foremost, any such submission is contrary to the correct
construction of the onus of proof. The present situation is really quite a stark
one. First, the Judge has positively found that defamatory publication to a class
of a substantial number of persons unknown occurred; such a finding is hardly an
unfamiliar one. Second, such finding, in the present case, leads to a further
finding that the respective multiple causes of action in relation to each of these
unknown persons are each made out *unless* the defendant proves qualified
privilege in respect of each and every of those causes of action.

446 In my view, the plaintiff succeeds at, or well before, this point of the
analysis. However, I will say something further as to the composition of the
“substantial number of unknown publishees”.

The composition of the substantial number of unknown publishees

447 Google would hardly deny (indeed it rejoices in the fact) that it has by far
the most used internet search engine in the world. Its very name has long been
literally synonymous with such searches; the word “google” is constantly used in
society as a verb in that connection, to the exclusion of any other search engine.²⁹⁰

448 It is true that many internet searches are made on the names of people who,
at any given time, are said by the mass media to be “high profile” or “famous”
(whether it be for their allotted ten minute period or longer). At the same time, it
is also an indisputable fact that people from all walks of life now quite routinely
search on the names of many “non-famous” people such as friends, friends of
friends, persons with whom they wish to become friendly, acquaintances,
workmates, rivals, enemies, persons they believe to be connected to any of the
above, and so forth.

²⁹⁰ The *Macquarie Dictionary* definition of ‘google’ is: *verb* (googled, googling); *–verb* (i) 1. to search for information on the internet, in particular using the Google search engine; *–verb* (t) 2. to search the internet for information about (something), in particular using the Google search engine: *to google the research topic*; *–noun* 3. an instance of such a search: *to have a little google*.

449 People do so for a great variety of reasons. It may emanate from vague and general views captured in adages such as “forewarned is forearmed” or “knowledge is power”. But such social searches may be for more specific reasons. To give an obvious and pervasive example, many persons “google” the name of persons they expect to see at a meeting, meal, function, party or sundry other occasions in order to prepare for the required small talk because googling may well give an insight as to topics of conversation.

450 Social searches may be made out of mere curiosity or just to pass the time, particularly if free Wi-Fi is available. To give a prosaic example, say a hairdresser cuts the hair of a new female customer, Ms X; the hairdresser is interested in something the customer says, or is just curious about her because of her clothing, demeanour, accent or something else even less definable. That evening, the hairdresser googles the name of the customer “out of curiosity” and her initially favourable view of the customer is changed by the defamatory matter that immediately confronts her. The next day, the hairdresser tells other customers or friends what she has learnt about Ms X. That night, more google searches occur in a number of residences. *Ainsi va la vie.*

The antecedents status and associations of Dr Duffy in society

451 Of course, the number of searches made on any given person will vary with the circumstances of that person. Dr Duffy was born in 1956 and at trial was 59 years of age. She has led a full life with a wealth of widely varying professional and social experiences. She has had professional and social relationships and associations with many people from all walks of life.

452 Dr Duffy attended different primary schools in Adelaide, Melbourne and the United Kingdom; and two different secondary schools in Adelaide. During the 1970s, she worked in photography and as a booking agent for stage and television artists in the United Kingdom before moving to Sydney in 1980. There, she worked in hospitality for five years until she returned to Adelaide in 1985 and commenced part-time tertiary studies.

453 Dr Duffy studied at Flinders University for approximately ten years from 1987 to 1997, where she obtained a Bachelor of Arts (majoring in politics and sociology); an Honours Degree (on Chinese politics); and a Doctorate in Philosophy (at the National Centre for Education and Training on Addiction and the Department of Politics). During this time, she continued to work in the hospitality industry and also as a care worker.

454 Between 1992 and 2003, Dr Duffy lectured or tutored in 15 different subjects in both the Department of Public Health and the Department of Politics at Flinders University, and at the University of South Australia in the Bachelor of Health Education and Physical Studies, and the Bachelor of Social Work courses. During this time, she also supervised a postgraduate student in conjunction with

three other professors from the Department of Public Health and the School of Nursing. She occupied various other roles at Flinders University including:

- as a project officer in the Department of General Practice (from April 1997 to March 1998);
- as a project manager of two projects in the Department of General Practice (between March 1998 and September 1999);
- as the chief investigator of a project from March to October 2000; and
- as a senior research officer at the South Australian Community Health Research Unit from January 2001 to January 2003.

455 Within this same time frame, from April 1997 to February 1998, Dr Duffy also acted as a project manager at the Royal Australian College of General Practitioners.

456 Dr Duffy left the tertiary education sector in January 2003. She occupied the position of senior research officer at various government departments and units:

- the Social Inclusion Unit of the Department of Premier and Cabinet from April 2003 to June 2003;
- the Research Analysis and Evaluation Unit of the Department of Health from July 2003 to May 2006;
- the Health Promotion Branch of the Department of Health from June to September 2006; and
- the Respiratory Function Unit of the Repatriation General Hospital from September 2006 to August 2010.

457 During this time, she was involved with researching issues unique to a wide range of community stakeholders, including:

- patients with Chronic Obstructive Pulmonary Disease;
- the Committee on Indigenous Intellectual Property Issues;
- HIV/Hepatitis C Services in South Australia;
- the Tattooing & Body Piercing Industries;
- the Reconciliation Working Group and Across Government Reconciliation Implementation Reference Committee; and

- sufferers of adult-onset hearing loss.

458 Between 1992 and 2010 Dr Duffy authored, either individually or jointly with more than 12 different individuals, numerous papers. They included:

- three refereed publications;
- five technical reports;
- three research reports;
- one chapter of an edited book;
- four conference papers;
- three evaluation reports;
- three written submissions;
- four research grant reviews; and
- seven research grant submissions.

459 Between 1993 and 2002, Dr Duffy gave 11 different conference presentations, eight of which were in locations across Australia and three overseas.

460 Dr Duffy volunteered her services in many unrelated organisations including:

- the “Community Living for the Disabled” from 1991 to 2000;
- the “Caring Canine Companions” from 2002 to 2005;
- the “Domestic Violence Project Reference Group” from 2001 to 2002;
- the selection panel for the Master of Mental Health Sciences from 2001 to 2002;
- the interview panel for the Graduate Entry Medical Program from 2000 to 2002; and
- the Flinders Institute of Health Research Committee from 2002 to 2003.

461 In all of the circumstances it is to be properly inferred that there very likely would have been, during the relevant period, a substantial number of google searches made on Dr Duffy’s name by a substantial number of people who knew

her (with varying degrees of familiarity or closeness), knew people who knew her, or who knew of her in various ways.

462 As I understand it, it is suggested by Google that some of the searches found by the Judge to have occurred may have been performed by persons “interested” in the contretemps between the plaintiff and a number of persons claiming to have supernatural power(s). These persons have thus far been referred to as “psychics” (presumably with an unexpressed disclaimer as to disbelief in the existence of such claimed powers) but I will use the term “pseudo psychics”. The fact is that the pseudo-psychics were systematically preying on lonely people who were desperate to hear optimistic prognostications to give them some hope in life, and who unfortunately paid substantial amounts of money to these charlatans and fraudsters.

463 But even if it be assumed that *some* of the substantial number of unknown persons were interested in the pseudo psychics’ contretemps, such an assumption does not avail the defendant for the following reasons. First, even if that assumption is made, it does not furnish a defence concerning the balance of the substantial number of unknown persons, as to each of whom there is a separate cause of action and the argument of the defendant falls at the first hurdle. Thus as explained in *The Law of Defamation and the Internet*:²⁹¹

[13.65] Where defamatory material is published to a number of recipients, only some of whom have the requisite interest or apparent interest in receiving it, the better view appeared to be that the statutory defences of qualified privilege will be potentially available in respect of publications to those recipients, but not to other recipients who do not have an interest or apparent interest in receiving the material.

[13.66] This matter was dealt with expressly in the now-repealed Defamation Act 1974 (NSW). It is not dealt with expressly in the Australian uniform defamation legislation. The statutory defences of qualified privilege in that legislation, however, apply to the ‘publication of defamatory matter’ to ‘a recipient’. Unlike at common law, where attention is directed to whether publication occurred on an ‘occasion’ of qualified privilege, the statutory defences direct attention to whether particular publications were made to particular recipients with an interest or apparent interest in having information on some subject. It thus seems clear that a defendant could have a statutory defence of qualified privilege in respect of some, but not all, publications of the same defamatory matter. The defence would succeed in respect of publications made reasonably to recipients with the requisite interest or apparent interest; it would fail in respect of publications not made reasonably, or publications to persons without the requisite interest or apparent interest.²⁹²

464 Secondly (proceeding nevertheless), the fact (if it be so) that some of the substantial number of unknown persons were interested in the pseudo psychics’

²⁹¹ Collins (ed), (2nd ed, 2010, Oxford University Press) [13.65-13.66].

²⁹² The first sentence of paragraph [13.66] refers to s 20(3) of the *Defamation Act 1974* (NSW) as it was at the time of *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 (to which Glass JA referred there at page 390); and at the time of *Barbaro v Amalgamated* (1985) 1 NSWLR 30 (to which Hunt J referred there at page 49). That section has no present equivalent in the *Uniform Defamation Acts 2005* or the *Defamation Act 2005* (SA).

contretemps does not *ipso facto* establish a qualified privilege defence in relation to the publications to each of such persons. The strictures in the authorities referred to above must be applied; the facts of a particular case are of critical importance in determining whether a particular case falls within the ambit of an interest recognised by the law. Thus searches directed to the pseudo psychics' contretemps may have been made out of mere curiosity which is *not* the sort of interest referred to, and required by, s 28(1). There is no qualified privilege in these circumstances.

465 Thirdly, even if it be postulated that some searches were made by the pseudo psychics themselves, or their associates, who may have had a more intimate and tangible reason for doing so, that assumption again does not of itself establish qualified privilege. Again, an interest recognised by the law has to be established by the defendant.

466 Google would no doubt concede (despite the impossibly wide terms of its contention reproduced above at paragraph [400]) that somewhere a line must be drawn. It simply cannot be that a person keying in the words "degrading child pornography" or "how to secretly make bombs with maximum killing efficiency" thereby establishes, by that mere keying action alone, that the person has an interest (or apparent interest) in being presented with search results that include the respective inquiry term and that, consequentially, all that is published is protected by qualified privilege as information being given to the recipient on the subject.

467 It may be said that charlatans and fraudsters are not as bad as paedophiles or terrorists, although poor persons who have been defrauded of hard earned money might have a contrary view. There may be something of a spectrum to be considered here but I decline to consider it further. What can be said with confidence is that this is the very sort of case in which resort should be had to the applicable onus of proof. I do not repeat the comments as to that matter made above except to reiterate that the words of both Gummow J and McHugh J reproduced above at paragraph [440] necessitate that the proof of such matters is the responsibility of the defendant, not the plaintiff.

468 Fourthly, there is yet a further overlay in that, even if there is a legitimate interest or apparent interest in having information on some subject, it must still be proven that the defamatory matter was published to the recipient *in the course of giving to the recipient information on that subject* under s 28 (1)(b). The mere fact that the publication takes place "at the same time" is not enough. Again, the burden of proof is on the defendant who is likely to fall at that hurdle (if not before).

469 Fifthly, there is the requirement to prove reasonableness, referred to below.

The conclusion of the trial Judge as to s 28(1)(a) and (b)

470 Against the background of the relevant authorities, the Judge concluded:

[406] Google published the defamatory words indiscriminately to anyone who wanted to search for references on the web to Dr Duffy regardless of the person's purpose or interest: it may have been simply a matter of curiosity or otherwise not a matter of substance apart from its mere quality as news. The requirement that the recipients had an interest in having information on the subject is not satisfied.

[407] Google contends that there is a public interest in the efficient availability of material on the web and in particular through the use of search engines. Whether or not that be so, a member of the public does not have an "interest" within the meaning of section 28(1)(a) in information on the web because it is on the web any more than a member of the public has an interest in reading information in a newspaper because it is in a newspaper.

[408] For the same reasons, the alternative requirement that the recipients had an apparent interest is not satisfied.

471 I consider that his Honour was correct. This would be sufficient to determine the appeal in favour of the plaintiff. However, I proceed to consider the third task of the defendant, to prove reasonableness under s 28(1)(c).

SECTIONS 28(1)(C) & 28(3) – THE REASONABLENESS REQUIREMENT

Introduction

472 As is evident from the very words of s 28, by raising statutory qualified privilege the defendant undertakes the burden of affirmatively proving that "its conduct in publishing the matter is reasonable in the circumstances". If confirmation is needed, in *Papaconstuntinos v Holmes á Court* French CJ, Crennan, Kiefel and Bell JJ stated:²⁹³

[7] The respondent did not plead the statutory defence of qualified privilege provided by the 2005 Act, which contains a requirement of reasonableness.²⁹⁴ He relied upon the defence at common law.²⁹⁵

Some general principles concerning proof of reasonableness

473 I first refer to some general principles concerning proof of reasonableness.

The approach to s 28(3) is not inflexible

474 In *Rogers v Nationwide News Pty Ltd*, Gleeson CJ and Gummow J stated:²⁹⁶

²⁹³ (2012) 249 CLR 534.

²⁹⁴ *Defamation Act* 2005 (NSW), s 30.

²⁹⁵ Which is unaffected by the *Defamation Act* 2005: see ss 6(2), 24.

²⁹⁶ [2003] HCA 52; 216 CLR 327, 339.

The considerations that bear upon the reasonableness of the conduct of a publisher of information for the purposes of s 22(1)(c) of the Act vary with the circumstances of individual cases. Some considerations of common relevance were set out by Hunt AJA in *Morgan v John Fairfax & Sons Ltd [No 2]*, but reasonableness is not a concept that can be subjected to inflexible categorization.

475 Factors present in a particular case not specifically referred to in s 28(3) may be taken into account. Thus in *Hockey v Fairfax Media Publications P/L*, White J referred to the equivalent of s 28(3) and stated:²⁹⁷

[225] As can be seen, s 30(3) lists matters which a Court *may* take into account in determining the reasonableness of a defendant's conduct. The Court is not confined to those matters. Other relevant matters may include the manner and extent of publication, the degree of care exercised and any knowledge by the defendant that a defamatory meaning may be conveyed: *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 390.

[226] In the *Defamation Act 1974* (NSW) (the 1974 Act), the defence of qualified privilege was contained in s 22. The requirement in that section that a respondent's conduct in publishing the defamatory matter have been reasonable was discussed in a number of the authorities. Although s 22 did not contain a counterpart of s 30(3) until 2002 when it was amended by the *Defamation Amendment Act 2002* (NSW), some of the authorities concerning it remain pertinent.

[227] In *Morgan v John Fairfax and Sons Ltd (No 2)* (1991) 23 NSWLR 374 at 387-8, Hunt A-JA identified a number of matters bearing upon the requirement of reasonableness in the former s 22(1)(c), which can be summarised as follows:

- (1) The conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter of which complaint is made. The more serious the imputation conveyed, the greater the obligation upon the respondent to ensure that its conduct in relation to the publication was reasonable;
- (2) If the respondent intended to convey any imputation in fact conveyed, it must (subject to some limited exceptions) have believed in the truth of that imputation;
- (3) If the respondent did not intend to convey any particular imputation in fact conveyed, it must establish:
 - (a) subject (to the same exceptions) that it believed in the truth of each imputation which it did intend to convey; and
 - (b) that its conduct was nevertheless reasonable in the circumstances in relation to each imputation which it did not intend to convey but which was in fact conveyed;
- (4) The respondent must also establish:
 - (a) that, before publishing the matter of which complaint is made, it exercised reasonable care to ensure that it got its conclusions right,

²⁹⁷ [2015] FCA 652.

- (when appropriate) by making proper inquiries and checking on the accuracy of its sources;
- (b) that its conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which it had obtained;
 - (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
 - (d) that each imputation intended to be conveyed was relevant to the subject about which it is giving information to its readers.

Hunt A-JA acknowledged at 388 that these propositions were not intended as an exhaustive statement of the matters bearing upon reasonableness. I observe that the matters in (2) and (3) of Hunt A-JA's list are not included in the list contained in s 30(3) of the 2005 Act.

The factors in s 28(3) are not a series of hurdles all of which the defendant must successfully negotiate

476 The factors referred to in s 28(3) are not a series of hurdles all of which the defendant must successfully negotiate. Again, I refer to *Hockey v Fairfax Media Publications P/L* where White J stated:²⁹⁸

[228] The matters listed in s 30(3) are not to be regarded as “a series of hurdles to be negotiated by a publisher before [it can] successfully rely on qualified privilege”: *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359 at [33] in relation to the matters identified in *Reynolds* as bearing on reasonableness. It is to be remembered that reasonableness “is not a concept that can be subjected to inflexible categorisation”: *Rogers v Nationwide News Pty Ltd* [2003] HCA 52; (2003) 216 CLR 327 at [30]. I also accept the submission of the respondents that reasonableness should not be interpreted as requiring a counsel of perfection, given that the predicate on which it operates is that the imputations in question are not true and that the conduct of the defendant is accordingly not beyond criticism.

Blatch v Archer principles concerning proof of reasonableness

477 *Blatch v Archer* principles²⁹⁹ may be applied in assessing whether reasonableness has been proven. The decision in *Echo Publications v Tucker* furnishes a succinct example. Hodgson JA (with whom Mason P and McColl JA concurred), after referring to certain circumstances to reasonableness, stated:³⁰⁰

[26] ... The Court has some material on which it might reach a view as to what would be a reasonable assessment of these matters, but has no evidence from *Echo Publications* as to what its actual assessment was. This is not a case like *Barbaro*, where there was, even in the absence of evidence from the defendant itself, strong evidence which enabled a view to be reached as to what the publisher's relevant state of mind was.

²⁹⁸ [2015] FCA 652.

²⁹⁹ *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969, 970: It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

³⁰⁰ [2007] NSWCA 320.

[27] In my opinion, this is a case where the conduct of Echo Publications might have been reasonable; but since the party in a position to lead evidence as to many circumstances relevant to the question of reasonableness has not done so, I am not satisfied it has discharged its onus of proving that its conduct was reasonable.

(Emphasis added)

The question of reasonableness must be tested as between the publisher and the person defamed

478 It is to be emphasised that the main focus is *not* just whether the publisher behaved “reasonably” having regard to the conditions of the enterprise in the context of which the publishing occurs; rather, the question of reasonableness must be tested as between the publisher and the person defamed. In *John Fairfax Publications Pty Ltd v Zunter*, Handley JA (with whom Spigelman CJ and McColl JA concurred) stated:³⁰¹

[30] The question of reasonableness must be tested as between the publisher and the person defamed, not as between the relevant employees and the publisher. The publisher must prove that it acted reasonably in relation to the person defamed despite publishing false and defamatory matter about him. A publisher who publishes serious allegations as fact without having checked with the person concerned is taking the risk that they cannot be justified. In that event, outside the limits of reasonableness, it is the publisher who bears the risk, not the person defamed.

[31] The Judge was not prepared to find that there was nothing unreasonable in publishing the story which identified Mr Zunter. In my judgment her decision was correct, and the Court did not find it necessary to call on Mr Evatt to support it.

479 This leads to a consideration – which must be in some detail – of the Google notification procedure, which is highly relevant to the question of reasonableness.

Overview of the Google “notification procedure” and the correspondence

480 Google’s position as a secondary publisher is advantageous in that it cannot be sued for publications of matter prior to a reasonable period following notification but only for those occurring subsequently. However, it is disadvantageous for Google here in that the subsequent publications must be regarded in the light of the fact that they occurred well after the time by which it was reasonable for Google to have blocked access (as determined by the Judge) and very much in the light of the whole of Google’s behaviour between initial notification and eventual blocking of access.

481 Sixteen months elapsed between the date (7 October 2009) by which the Judge considered that it would have been reasonable to remove the links following notification by Dr Duffy,³⁰² and when the first URLs were removed.

³⁰¹ [2006] NSWCA 227.

³⁰² (2015) 125 SASR 437, [245].

482 During this 16 month period, and for some ten months thereafter, Dr Duffy endeavoured to have the defamatory search results removed. She attempted to communicate with various email addresses said to relate to Google Australia, Google Inc and various departments and “teams” (including the “Help team”, the “Removals team”, the “Legal team”) to which various entities she was directed, or misdirected, in a highly confusing fashion. She received numerous contradictory emails from an unknown number of anonymous employees who refused to reveal their identity, signing their emails only by reference to the name of a so-called “team”.

483 Dr Duffy received multiple identical emails. They were either automated responses or copied directly from a precedent data base. Many were internally inconsistent. Some emails contradicted other emails, such as Dr Duffy being given instructions as to how to request the removal of search results one day, yet on the next being told that Google cannot, or does not as a matter of policy, remove such search results.

484 Not one search result was removed prior to institution of legal proceedings by Dr Duffy in February 2011. There is no doubt that such institution was the only reason that Google did commence to remove them shortly thereafter in March 2011. This conduct of making Dr Duffy jump through hoops, and then back through the same hoops, was likely to make the process for having search results removed so difficult as to deter her from persisting. It is an important factor when considering whether Google have proved reasonableness under s 28(3).

The correspondence between the plaintiff and Google in more detail

485 The story commences on 7 September 2009 when Dr Duffy sent an email to the address reception-au@google.com (“*Google Australia*”), requesting that the links to the Ripoff Reports be removed from the search results. She noted that she had tried to call Google that day but “could not get past the automated messages”. On the same day she received a reply from *Google Australia* requesting further details.

486 On 8 September 2009, Dr Duffy replied to *Google Australia* detailing the defamatory content of the websites and snippets appearing as a result of Google searches of her name, and providing the full URL link for the first to fourth Ripoff Report webpages and two complaints board webpages; and the content (copied and pasted) of each initial report.

487 On 9 September 2009, Dr Duffy sent multiple emails to *Google Australia* requesting that they confirm receipt of the information she had sent the previous day.

488 On 10 September 2009, *Google Australia* replied to Dr Duffy, advising that the matter had been forwarded to “*the Removals Team* in the US for review”.

Dr Duffy replied to *Google Australia* that same day, requesting the contact details for *the Removals Team*. *Google Australia* then provided her with an email address.³⁰³ That same day, Dr Duffy sent an email to removals@google.com ("*the Removals Team*"), emphasising the urgency of the matter.

489 On 11 September 2009, having not received any reply from *the Removals Team*, Dr Duffy emailed *Google Australia* referring to this failure. *Google Australia* replied that day, but only to state that the matter was "now in the hands of *the Removals Team*" and that there was nothing else *Google Australia* could do. Dr Duffy again emailed *the Removals Team* requesting they confirm receipt but they did not do so.

490 On 12 September 2008, Dr Duffy again emailed *Google Australia*, requesting the name of a member of *the Legal Team* for *Google Australia*. *Google Australia* forwarded her email to help@google.com.au ("*the Help Team*"). On 12 September 2008, Dr Duffy sent an email in relation to the matter to another address, legal-support@google.com ("*the Legal Team*") in which she complained that "*Google Australia* had simply handballed the issue" to *the Removals Team*, who had not responded to her emails.

491 On 15 September 2009, Dr Duffy received an email from *the Help Team* purporting to set out the information they required in order to remove information (to be referred to as the "*15 September 2009 what is required email*"). Dr Duffy had in fact already provided all of this information to *Google Australia* on 8 September 2009 and had been assured by *Google Australia* on 10 September 2009 that it had been forwarded to *the Removals Team*. The "*15 September 2009 what is required email*" is as follows:

Hi Janice,

Thank you for your note. To request that we remove information from our service because that information violates your rights under the laws of your country, you must provide a notification (by email, fax or regular mail) that sets forth the items specified below. If you're not sure whether you have the right to request removal from our service, we suggest you seek the advice of an attorney.

Please use the following format (including section numbers)

1. Identify precisely the Google website where the information above appears (for instance, Google.fr). This is required because each website is governed by the specific laws of the country with which it is associated.
2. Identify your country or countries of residence and citizenship.
3. Identify precisely (a) the URL of each allegedly illegal search result displayed on the Google website specified in 1. above, (b) the exact text or content you claim violates your rights under applicable law (the "Unlawful Material,") and (c) the reason you believe the

³⁰³ Exhibit 1, Tab 166.

content violates your rights or is illegal under applicable law. If possible, please cite the specific law(s) of your country you believe to be applicable.

FOR WEB SEARCH, YOU MUST IDENTIFY EACH SEARCH RESULT THAT DIRECTLY LINKS TO A WEBPAGE THAT ALLEGEDLY CONTAINS UNLAWFUL MATERIAL. This requires you to provide (a) the search query that you used, and (b) the URL for each allegedly unlawful search result. (Note that the URL for each search result appears in green on the last line of the description for that search result.).

...

4. Provide information reasonably sufficient to permit Google to contact you (email address is preferred).

5. Include the following statement: "I have a good faith belief that the information specified above is not permitted by applicable law."

6. Include the following statement: "I swear, under penalty of perjury, that the information in this notification is accurate."

7. Sign the communication.

8. Send the communication to one of the following:

Email: removals@google.com or reply to this message

Fax: +1(650)963-3255, Attn: Google Legal Support

Regular mail:

Google Inc.

Attn: Google Legal Support

1600 Amphitheatre Parkway

Mountain View, CA 94043

USA

(Emphasis added)

492 On 18 September 2009, at a time when the Google regime purported to be that Google would (and therefore could) "remove information from our service because that information violates your rights under the laws of your country", and in circumstances where Dr Duffy had previously provided all of the requested details which had purportedly been forwarded to *the Removals Team*, Dr Duffy received a further email reply from the same *the Help Team* address which now suddenly asserted that it was not possible for Google to remove search results. This will be referred to as the "18 September 2009 there is nothing that Google can do to remove the offending content email". It read:

We recognize your concern, but there is nothing that Google can do to remove the offending content without the cooperation of the site's webmaster....

Google simply aggregates information already published on the web. Even if we were able to eliminate the offending page from our index, it would still exist on the web. Every few weeks our robots crawl the web for content. If the site is available on the internet, we will likely pick it up and add it to our index again. Only the webmaster can, by including code that blocks our robots, prevent a page from appearing on Google...

493 Of course, to suggest that “there is nothing that Google can do to remove the offending content without the cooperation of the site’s webmaster” was entirely false, as was the suggestion that Google could not achieve anything more than short term removal. This is made pellucidly clear by the subsequent actions of Google in removing various parts of the offending material (but only after Dr Duffy had instituted litigation).

494 It is also confirmed by the very evidence given at trial. Thus the evidence of Mr Madden-Woods, an employee of Google, at trial was that the Google technology crawls the web in a highly methodical manner and that it could achieve permanent removal:

[77] The crawler program is constantly visiting and processing webpages on the Web. The process is performed with the use of a large number of computers that run the Web crawler algorithms to visit a large number of webpages at once. The Web crawlers for the Google Search Engine visit more than 20 billion webpages in a day.

[78] The crawler program, a fully automated computer program with no human intervention, determines which websites to crawl, how often to crawl the websites and what information is collected about those websites. For example, the frequency with which a particular webpage is crawled, as determined by the crawler program, depends on the relative importance of the webpage determined by an assessment of factors such as how frequently the webpage is updated, how popular the website where that webpage is located is, and how many requests can reasonably be handled by that website’s host computer in a given timeframe. Important pages, as determined by the crawler program, may be crawled for new data every few minutes to few hours. Less important pages may be crawled at intervals of weeks or months.

495 It is, of course, incredible to suggest that there would be an entire *Removals Team* with the capacity to remove URLs, if such removal only lasted for a short period of time. Mr Madden-Woods made it clear that the process of removal of material meant that it would *not* be picked up again by the crawler program:

It is also important to note that when a removal request is given effect by Google, the entire website or domain is not removed from the search results, just the specific page complained of, corresponding to the URL communicated to Google.

...

As part of the removals engineering team, I would receive from the Legal Team within Google a request to remove a webpage from search results returned for a particular country code domain of the Google Search Engine. For example, the request would be to remove the webpage from results returned from the Google Search Engine at google.com.au. I would then manually add the unique URL for that webpage to a list. During the ranking stage, the Google Search Engine removes all the URLs found in the removals list from the list of possible results, before a ranked list of results is returned to the user’s browser for display by the browser on that user’s computer (or tablet or smartphone).

496 And in oral evidence:

Q So am I right in understanding that, putting that example to one side, in the ordinary course a URL is blocked such that, regardless of the search time³⁰⁴ typed in, that URL won't be returned in the search results?

A That's correct, yes.

497 Not only was the "18 September 2009 there is nothing that Google can do to remove the offending content email" false, it was also manifestly inconsistent with the *Help Team's* first reply to Dr Duffy in the "15 September 2009 what is required email". That email had clearly proceeded on the basis that Google did have a viable system for preventing defamatory matter being returned in google searches provided that the particular detailed information requested by Google was supplied. Indeed, Dr Duffy referred to this very inconsistency matter in her reply sent on 18 September 2009:

Under Australian and other international defamation laws you are responsible for the transmission of Defamatory material. ... Google places the reports from this site above links to my academic work ... I have received instructions from the removal team about how to structure my request in a way that suits google. Are you now telling me that if I go through this process of correctly requesting Google to remove the links they may be picked up again?

498 But to no avail. On 19 September 2009, *the Help Team* replied to Dr Duffy's query by sending an email which simply replicated the exact terms of the "15 September 2009 what is required email".

499 On 22 September 2009, Dr Duffy repeated her request to *the Removals Team* for the above snippets and links to be removed, via email and fax. At this time, she also sent a 17 page attachment detailing the relevant URLs; what search terms returned them as results; and why she sought the removal of the URLs. Dr Duffy also provided links to an additional five webpages and asked that they also be removed for the same reason. In this attachment, she rightly criticised Google:

for the difficult process an individual must undergo in order to have untrue and defamatory information ... removed.

500 Dr Duffy followed up this email by re-sending to *Google Australia*, to *the Removals Team* and to *the Help Team*, on 28 and 29 September and 3 October 2009 respectively, the removal request she had previously sent.³⁰⁵

501 On 7 October 2009, *the Help Team* replied to Dr Duffy in identical terms as the "18 September 2009 there is nothing that Google can do to remove the

³⁰⁴ Clearly the phrase used was "search term".

³⁰⁵ Exhibit 1, Tabs 193, 194.

offending content” email, again stating falsely that it could not remove any of the listed URLs.³⁰⁶

502 It would seem that the correspondence from Google had come around in a full circle in a way calculated to imbue any complainant with a sense of futility and helplessness.

503 On 16 February 2010, Dr Duffy wrote to the General Manager of *Google Australia* in relation to her request. No response was ever received.

504 On 12 July 2010, Dr Duffy sent concerns notices (as defined in s 14(2) of the *Defamation Act 2005*) to *Google Australia* and *Google Inc* requesting the removal of the snippets from and links to the 11 webpages listed above. At this time, she listed an additional three URLs which she requested to have removed on the same grounds. No response was ever received from *Google Inc* or *Google Australia*.

505 On 20 November 2010 and 8 December 2010, Dr Duffy sent additional concerns notices to *Google Australia* and *Google Inc* respectively.³⁰⁷

506 No response was ever received to the 20 November 2010 concerns notice, but on 15 December 2010, *the Help Team* purportedly replied to Dr Duffy’s 8 December 2010 concerns notice, but only by, yet again, reproducing the exact wording of the fatuous “18 September 2009 there is nothing that Google can do to remove the offending content email” (which they had also previously sent in the identical email of 7 October 2009 over one year earlier). Thus on 15 December 2010, in the very teeth of the correspondence that had occurred since 18 September 2009, Google again for the third time falsely stated that they could not prevent a page from appearing on Google:

We recognize your concern, but there is nothing that Google can do to remove the offending content without the cooperation of the site’s webmaster....

Google simply aggregates information already published on the web. Even if we were able to eliminate the offending page from our index, it would still exist on the web. Every few weeks our robots crawl the web for content. If the site is available on the internet, we will likely pick it up and add it to our index again. Only the webmaster can, by including code that blocks our robots, prevent a page from appearing on Google ...

507 On 16 February 2011, after more than 16 months of requesting that Google remove the search results and being treated by Google in the above fashion, Dr Duffy initiated proceedings in the Supreme Court against Google Inc.

³⁰⁶ Exhibit 1, Tab 198.

³⁰⁷ The complaints notice was dated 2 December 2010; the Australia Post delivery receipt was dated 8 December 2010.

508 On 7 March 2011, moving from complaining customer mode to litigation mode, Google Inc removed from the search results the snippets and links relating to the first four Ripoff Report webpages.

509 On 17 March 2011, Mr Bradshaw, Dr Duffy's then-solicitor, wrote to counsel for Google requesting removal of "around 40 URLs" which the Ripoff Report website had created "with links to Ripoff Report with flow on consequences in terms of what currently appears on the Google sites". There was no response.

510 On 24 March 2011, Mr Bradshaw again emailed counsel for Google stressing that the defamatory material was continuing to appear. On 7 April 2011, counsel for Google replied with the "7 April 2011 Communication Decency Act email". It including the following bewildering passage:

I note that the list you have provided contains a significant number of URL's which remain truncated. Could you please provide the complete URL's?

In terms of your comments regarding google.com, as I am now instructed by Google Inc. I am able to respond – while Google Inc notes your client's position, Google.com is a US site regulated by US law. Google provides access to publically available webpages, but does not control the content of the billions of pages currently in the index. Given this fact, and pursuant to section 230(c) of the Communication Decency Act, Google Inc does not remove allegedly defamatory material from the Google.com search results. Your client will need to raise the matter directly with the webmaster of the pages in question to have this information removed or changed.

I would be grateful if you could provide the list of pages with the complet [sic] URLs.

511 Several internally inconsistent matters may be noted in this passage. The first paragraph, by requesting the complete URLs, might appear to be intended to convey an impression of an ability and willingness to do something. But the second paragraph claims an inability to do anything, which in turn appears to be contradicted yet again by the third paragraph which promises gratitude for the provision of the "list of pages with the complet [sic] URLs".

512 Of course, the second paragraph is quite inconsistent with much of Google's correspondence during the "complaining customer" period including *the Removals Team* providing instructions on how to request that search results be removed, and the actual removal of certain search results on 7 March 2011.

513 The reference in the second paragraph to the mysterious *Communications Decency Act* was, however, new. On 14 March 2011 Dr Duffy's solicitors responded by email pointing out, correctly, that Dr Duffy was suing only in respect of publication within Australia, and thus the *Communications Decency Act* was irrelevant.

514 On 15 July 2011, Dr Duffy’s solicitors wrote to counsel for Google informing it of the autocomplete term “janice duffy psychic stalker”, and requesting its removal. No reply was ever received.

515 It may be mentioned here that the autocomplete device was an internal Google function and therefore it is extremely difficult to imagine how Google could have claimed an inability to comply with such a request. And nor did Google adduce any evidence at trial claiming any such inability or explaining how long it would have taken to remove the autocomplete term if it had been prepared to do so.³⁰⁸

516 On 26 September 2011, Dr Duffy’s solicitors again wrote to counsel for Google to complain that the autocomplete term had not been removed, and to list some further 117 defamatory links, most of which continued to appear as a search result. On 10 October 2011, *the Removals Team* responded by another bewildering email. It stated that they had “decided not to take action based on [their] policies concerning content removal” in relation to the additional URL’s. It employed identical language to that previously used by Google’s counsel in the “7 April 2011 Communication Decency Act email”:

Google provides access to publically available webpages, but does not control the content of the billions of pages currently in the index. Given this fact, and pursuant to section 230(c) of the Communication Decency Act, Google Inc does not remove allegedly defamatory material from the Google.com search results.

517 But, again internally inconsistently, in relation to other URLs provided by Dr Duffy’s solicitors on 26 September 2011, *the Removals Team* requested information as to “which specific text you claim violates your rights under applicable law and the reason you believe the content violates your rights or is illegal under applicable law”.

518 On 23 October 2011, Dr Duffy sent an email to *the Removals Team* requesting a further Complaints Board webpage be removed. On 24 October 2011, she received a response which appears to bespeak yet another Google mode of obfuscation, the “Hi, Thanks for reaching out to us!” mode. The “24 October 2011 Hi, Thanks for reaching out to us! email” is a document that is both fatuous and disingenuous in the extreme. It stated:

Hi,

Thanks for reaching out to us!

We have received your legal request. We receive many such complaints each day; your message is in our queue, and we’ll get to it as quickly as our workload permits.

Due to the large volume of requests that we experience, please note that we will only be able to provide you with a response if we determine your request may be a valid and

³⁰⁸ (2015) 125 SASR 437, [252].

actionable legal complaint, and we may respond with questions or requests for clarification. For more information on Google's Terms of Service, please visit <http://www.google.com/accounts/TOS>

We appreciate your patience as we investigate your request.

Regards,

The Google Team

519 However, on the very next day, 25 October 2011, without further explanation of the "24 October 2011 Hi, Thanks for reaching out to us! email", the Google Team sent another email outlining a necessary procedure for notifying them of removal requests. It was in remarkably similar (but not identical) terms to those previously used. It adopted the "Thanks for reaching out to us" greeting and later introduced another new, and no doubt interesting entity, *Chilling Effects* (<http://www.chillingeffects.org>). It read:

Hello,

Thanks for reaching out to us.

To request that we remove information from our service because that information violates your rights under the laws of your country, please reply to this email with the information specified below:

Identify precisely (a) the URL of each allegedly illegal web page linked to from the Google search results displayed on the Google website specified in 1. above (the page URL can be found by cutting and pasting the URL out of the browser bar while on the offending page in question), (b) the search query that you used on Google to find the page, (c) the exact text or content you claim violates your rights under applicable law (the 'Unlawful Material') and (d) the reason you believe the content violates your rights or is illegal under applicable law. If possible, please cite the specific law(s) of your country you believe to be applicable.

For example, suppose you conducted a search on Google.com using the query [Google], and believed that the third and fourth results directly linked to a webpage that violated your rights under applicable law. In such a case, you would provide the following information:

Search Query: Google

Allegedly Illegal Webpages:

http://www.illegalexample.com/illegal_stuff/illegal_page.html

The text 'Defamatory Content Example 1' on the webpage above violates my rights because it contains allegedly defamatory material not permitted under the laws of the country in which I reside or am a citizen.

http://www.illegalexample.com/illegal_stuff/illegal_page_2.html

The text 'defamatory Content Example 2' on the webpage above violates my rights because it contains allegedly defamatory material not permitted under the laws of the country in which I reside or am a citizen."

Please note that a copy of each legal notice we receive is sent to a third-party partner for publication and annotation. As such, your letter will be forwarded to Chilling Effects (<http://www.chillingeffects.org>) for publication. You can see an example of such a publication at <http://www.chillingeffects.org/internationalnotice.cgi?NoticeID=1860>. A link to your published letter will be displayed in Google's search results (with your personal information removed) in place of the removed content.

In the event we do not receive further information from you as requested above, please be advised that we will be unable to take any further action on your removal request.

Regards,

The Google Team

520 On 27 October 2011, Dr Duffy sent an email (endeavouring to comply with this procedure and using the same format as the example provided by Google), in relation to some 20 Ripoff Report webpages. On 2 November 2011, *the Removals Team* replied as follows:

We have received your attached defamation complaint. We are currently reviewing the complaint and will contact you when we have completed processing the request. We appreciate your patience during this process.

Please note that a copy of each legal notice we receive is sent to a third-party partner for publication and annotation. As such, your letter will be forwarded to Chilling Effects (<http://www.chillingeffects.org>) for publication ... A link to your published letter (with your personal information removed) will be displayed in Google's search results in place of the removed content.

521 On 3 November 2011, *the Removals Team* emailed Dr Duffy and stated that they had removed 13 of the Ripoff Report URLs as requested on 24 October 2011.

522 On 6 November 2011, Dr Duffy wrote to *the Removals Team* reiterating her previous requests that the remaining URL's and autocomplete suggestions be removed. On 7 November 2011, they replied, stating that they were investigating her request and adopting the language used by Google's counsel in the "7 April 2011 Communication Decency Act email":

Please note that Google.com is a US site regulated by US law. Google provides access to publicly available webpages, but does not control the content of any of the billions of pages currently in the index. Given this fact, and pursuant to section 230(c) of the Communications Decency Act, Google does not remove allegedly defamatory material from our google.com search index.

523 In respect of the autocomplete feature, *the Removals Team* said:

The predictions that appear in the drop-down menu are an objective reflection of query terms that are popular with our users and on the internet. Google does not manually select these terms or determine what queries are considered related to each other. Instead, we use algorithms to detect patterns based on data sources including user search queries. While we do apply a narrow set of filters for certain offensive content, it is not our policy to grant individuals' requests to manually remove or modify other automatically generated predictions.

524 Two points may be made here about this reply. First, the valid point made on 14 March 2011 by Dr Duffy's solicitors that Dr Duffy was suing only in respect of publication within Australia, and thus the *Communications Decency Act* was irrelevant, was conveniently ignored. At no stage at trial or on appeal was it asserted by Google that this statute posed a legal impediment to removing defamatory material in relation to publication within Australia.

525 Secondly, as to the autocomplete feature, this appears to be yet another attempt to hide behind the generalised excuse of "policy" (being Google's own self-imposed "policy") and is quite inconsistent with the evidence that Mr Herscovici, an employee in *Google's autocomplete team*, was to later give at trial:

We at Google get sometime removal requests. There is a team – there are actually two teams – there is the policy team and there is the legal team and they are both responsible for screening those removal requests, and if those removal requests are approved by one of these teams they are forwarded to us, to the engineering team, and the engineering team pushes the removal to our ..., essentially, and the autocomplete is removed from the autocomplete facility.

526 And further in cross-examination:

Q ... So to stop autocomplete terms from appearing in the autocomplete function, what's the technical process?

A Okay, I see. So there are two of them. One of them is more algorithmic in a sense where we have algorithms that look at the autocompletions and decide, not by looking at word-based ... to remove some suggestion – some autocomplete. An example would be that we used a number of porn results within the results of a query to decide whether this is a porn query regardless of the terms that appear in it. So that's one way. The other way is indeed through what you call black lists where basically we say if a term – if some kind of term or some kind of term combination appears within a query in autocomplete then we mark that query for removal and removed it.

527 On 30 November 2011, *the Removals Team* wrote to Dr Duffy stating that the first four Ripoff Report pages had been removed, but that it would not remove the remaining links. It stated, without any explanation let alone justification:

At this time, in accordance with Google Inc.'s policies, we have decided not to remove:

<http://www.ripoffreport.com/directory/Kasamba-LivePerson.aspx?p=2>
<http://www.ripoffreport.com/directory/liveperson.aspx?p=3>
<http://www.ripoffreport.com/fortune-tellers/liverperson-kasamba/liveperson-com-kasamba-liv3e678.htm>
<http://www.ripoffreport.com/Services/Astrologers--Psychics/Search.aspx?p=9>
<http://www.ripoffreport.com/directory/james.aspx?p=31>
<http://www.ripoffreport.com/lists/1/default1674.htm>
<http://www.ripoffreport.com/Reports/default2242.htm>
<http://www.ripoffreport.com/Services/Psychic.Search.aspx?p=21>
<http://www.ripoffreport.com/Services/Psychic/Search.aspx?p=23>
<http://www.ripoffreport.com/Unusual-Rip-Off/psychic-fortune-tellers/Search.aspx?p=13>

from our index at google.com.au or google.com

Regards,

The Google Team...

528 On 4 December 2011, Dr Duffy replied to the 30 November 2011 email and requested an explanation as to why Google had decided not to remove some of the URLs. In response, by email on 11 December 2011, *the Removals Team* requested that any further questions from Dr Duffy be sent from her lawyer to counsel for Google.

529 On 17 December 2011, Dr Duffy sent an email to *the Removals Team* requesting a further Ripoff Report webpage be removed. On 17 December 2011, she received an identical response to the “24 October 2011 Hi, Thanks for reaching out to us! email”, again stating that Google “would only respond if they determine the request to be a “valid and actionable legal complaint”.

530 However, without any explanation, on 21 December 2011, *the Removals Team* informed Dr Duffy that an additional Ripoff Report webpage had been removed.

531 On 23 October 2011, Dr Duffy’s solicitor sent a letter to counsel for Google yet again complaining about the continuing autocomplete search results, and providing a list of some 143 Ripoff Report URLs pertaining to Dr Duffy that continued to appear as search results.

532 With no reference to Dr Duffy’s solicitor’s letter of 23 October 2011, counsel for Google sent a letter on 14 November 2011, which stated:

As previously advised, all notifications of URLs or other content complained of by your client have been and will be forwarded to our client, Google Inc. We note your assertion as to the basis upon which your client’s claim is brought. Our client, Google Inc, is aware of the basis of your assertion, however, its position is as set out in the email to you.

We also understand that Google Inc has requested further information, in its e-mail of 10 October 2011 to you, in respect of the notifications of allegedly defamatory material. In order for your client’s request to be considered, we suggest that you or your client provide the requested information.

533 Counsel for Google then purported to address Dr Duffy's solicitor's letter of 23 October 2011 in a further letter on 19 November 2012.

534 On 4 January 2013, Dr Duffy sent *the Removals Team* another request for removal. The only response was an email on 7 January 2013 in exactly the same terms as the "24 October 2011 Hi, Thanks for reaching out to us! email" (which she had previously received twice, on 24 October 2011 and 17 December 2011).

535 Google had very little to say on the appeal concerning their unsatisfactory dealings with Dr Duffy. I turn to s 28(3) paragraphs (a) to (j).

Paragraph (a): The extent to which the matter published is of public interest

536 Google had much to say as to the wonders of the internet and their search engine and how much this technology is "in the public interest". They had much to say as to the highly automated and instantaneous nature of their system and as to how unreasonable and unrealistic were the difficulties sought to be imposed upon them concerning monitoring and restriction of publication of defamatory material. But, they had very little to say concerning the sublime irony of such circuitous arguments being presented by the very entity which had chosen and introduced that very automated system for the purposes of commercial profit.

537 The present situation is somewhat reminiscent of that in *Dow Jones & Co Inc v Gutnick*. There, Gleeson CJ, McHugh, Gummow and Hayne JJ stated:³⁰⁹

[38] In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. ...

[39] It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television and it may, therefore, be doubted that it is right to say that the World Wide Web has a uniquely broad reach. It is no more or less ubiquitous than some television services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.

538 And Callinan J stated:

[186] The Court was much pressed with arguments about the ubiquity of the Internet. That ubiquity, it was said, distinguished the Internet from practically any other form of human endeavour. Implicit in the appellant's assertions was more than a suggestion that any attempt to control, regulate, or even inhibit its operation, no matter the

³⁰⁹ (2002) 210 CLR 575.

irresponsibility or malevolence of a user, would be futile, and that therefore no jurisdiction should trouble to try to do so. I would reject these claims. Some brands of motor cars are ubiquitous but their manufacturers, if they wish to sell them in different jurisdictions must comply with the laws and standards of those jurisdictions. There is nothing unique about multinational business, and it is in that that this appellant chooses to be engaged.

539 A basic point concerning s 28(3)(a) arises. The correct construction of “the matter published” in s 28(3)(a) is that it refers to the defamatory matter under consideration. There are dangers of elision here. The relevant question is the extent to which the publishing of the particular defamatory matter is *of public interest*. This is very much to be distinguished from what Google unsurprisingly seeks to emphasise, namely a submission that the public has an interest in the prospering and well-being of the internet in general and Google in particular.

540 Further, if one reverts for a moment to the extreme approach advocated by Google to the effect that there is really nothing left of the interest requirement in s 28(1), presumably upon the basis that all such analysis is to proceed by reference to reasonableness under ss 28(1)(c) and 28(3), then a very concentrated focus indeed needs to be placed on paragraph (a): *The extent to which the matter published is of public interest*.

541 In my view the word “interest” in paragraph (a) is again being used in the sense of public interest recognised by law (as distinct from mere gossip, the titillation of calumny and so forth). Seen in that light, the “public interest” in this rather pathetic squabble between Dr Duffy and the pseudo psychics is nil, or so close to nil that it does not matter.

542 I jump forward to consider paragraphs (e) and (f) out of alphabetical order for reasons that become apparent.

Paragraph (e): Whether it was in the public interest in the circumstances for the matter published to be published expeditiously

543 Again, there are dangers of elision here. The relevant question is the extent to which the particular expedient publishing of the particular defamatory matter is of public interest. This is again very much to be distinguished from what Google seeks to make the focus of attention, namely the automated and instantaneous nature of their system, and the asserted public benefit of the existence of that system in general.

544 Indeed, paragraph (e) really proceeds on the logically necessary premise that the defamatory matter has already been found to be relevant to a subject matter of some public importance, with the question arising as to whether that public importance reasonably necessitated “expeditious” publishing (and hence some allowance being made for inaccuracies resulting from an urgency to publish such important material quickly.)

545 In fact, that necessary premise simply does not exist here; the subject itself was never of public importance and there was never any urgency about publishing the defamatory matter.

Paragraph (f): The nature of the business environment in which the defendant operates

546 It is in paragraph (f) that Google's concerns for its business model finds its home. In *Rogers v Nationwide News Pty Ltd*, Gleeson CJ and Gummow J spoke plainly concerning the relevance of the publisher being a large commercial enterprise with a profit motive. Their Honours said:³¹⁰

In the respondent's written submissions, reference was made, without elaboration, to "the circumstances in which daily newspapers are published". It may be enlightening if, in cases such as the present, courts were given more evidence as to those circumstances. Such evidence would be available to the publishers, not to those who have been defamed.

...

In this context, reasonableness is to be judged by reference to the legitimate interests which the law of defamation seeks to protect. That includes the public interest in freedom of speech, and the appellant's interest in his reputation. The legitimate commercial interests of the respondent are entitled to due consideration. But reasonableness is not determined solely, or even mainly, by those commercial interests. The respondent carries on its business with a view to making profits for the benefit of its shareholders. All business entails risk. Profit is the reward for taking risks. From the point of view of the success of the respondent's enterprise it might be rational to take a risk of damaging someone's reputation, and of being found liable to pay damages. A publisher may calculate that it is worthwhile to risk defaming somebody, or perhaps even to set out deliberately to defame somebody. From the point of view of its internal management, such conduct may be economically rational. That does not mean it is reasonable for the purposes of s 22(1)(c). It may be that most people who are defamed in newspapers never sue. For all the courts know, that may be something that publishers take into account in deciding their business practices. But if, in consequence of an avoidable error, a person is defamed, and sues, then reliance on s 22 of the Act will ordinarily involve explaining how the error came to be made, and why it could not reasonably have been avoided, bearing in mind the harm it was likely to cause. Defendants who rely upon "the circumstances in which daily newspapers are published" need to condescend to greater particularity when seeking to persuade a court that their conduct has been reasonable.

547 The words of Gleeson CJ and Gummow J in *Rogers v Nationwide News Pty Ltd* lead to a brief reference to s 28(5) of the Act which provides:

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

548 This provision and its interstate equivalents appear to be little discussed but its genesis is no doubt the decision of the Privy Council in *Macintosh v Dun*³¹¹ and its effect is to curtail the breadth of that decision. However, it is to be

³¹⁰ 216 CLR 327, 340.

³¹¹ (1908) 6 CLR 303; [1908] AC 390.

emphasised that the words “not defeated merely because” do suggest that the fact that defamatory matter was published for reward remains a cumulative factor to be taken into account when considering whether a defence of qualified privilege has been established; and this is the way that the topic was approached by Gleeson CJ and Gummow J in *Rogers*.

549 The decision of the Privy Council in *Macintosh v Dun*³¹² and the significance of a profit motive generally have been discussed by the High Court in the context of common law qualified privilege on a number of occasions. In *Bashford*, French CJ, Hayne and Heydon JJ stated:³¹³

The significance of a profit motive

[14] Reference must be made, and was made in argument in this Court, to the advice of the Privy Council in *Macintosh v Dun*³¹⁴ and the decision of this Court in *Howe & McColough v Lees*.³¹⁵ But attention cannot be, and was not, confined to those two decisions. Both must be set in the general fabric of the law relating to qualified privilege.

[15] Each concerned mercantile references. *Macintosh* concerned a reference given by a trade protection society, or mercantile agency, to one of its subscribers about the commercial “standing, responsibility, [*et cetera*]” of a trader for the purpose “of aiding [the subscriber] to determine the propriety of giving credit” to the trader.³¹⁶ It was ultimately held that the reference was not made on an occasion of qualified privilege. In giving the advice of the Privy Council, Lord Macnaghten emphasised that the information upon which a mercantile agency would base its reference about a trader’s standing would include confidential information. His Lordship referred³¹⁷ to the possibility that such information would be extorted from the trader, or would come from gossip, discharged servants or disloyal employees. Accordingly, although it would be convenient for a subscriber, who was also a trader, to know what Lord Macnaghten described³¹⁸ as “all the secrets of his neighbour’s position, his ‘standing’, his ‘responsibility’, and whatever else may be comprehended under the expression ‘*et cetera*’”, the good of society did not require that disclosure of such information for profit be privileged.

[16] The fact that the mercantile agency was in the business of providing the information was evidently an important consideration leading to denial of the claim to privilege. It would be wrong, however, to isolate that element of profit and conclude that it will, in every case and without more, deny the availability of a defence of qualified privilege. In *Macintosh*, further elements were identified: the disclosure of confidential information would be sought, and it would likely be sought by means condemned as at least inappropriate, if not unlawful. While these further considerations were seen as *following* from the existence of the profit motive, they were considerations critical to the conclusion that the occasion was not privileged.

³¹² (1908) 6 CLR 303; [1908] AC 390.

³¹³ (2004) 218 CLR 366.

³¹⁴ (1908) 6 CLR 303; [1908] AC 390.

³¹⁵ (1910) 11 CLR 361.

³¹⁶ *Ibid*, 304.

³¹⁷ *Ibid*, 307.

³¹⁸ *Ibid*, 307.

550 Their Honours, after analysing the decision in *Howe* (where *Macintosh* was distinguished), made the further observations:

[20] It is important to recognise that, in rejecting the analysis made in the Full Court of New South Wales and this Court [in *Howe & McColough*], the Privy Council [in *Macintosh*] did not endorse the proposition urged in the Full Court that payment for information necessarily denies that the occasion of its communication is privileged. Nor did the Privy Council hold that the voluntary assumption of obligations (whether by contract or otherwise) is necessarily inconsistent with the existence of mutual duty or interest. What distinguished *Macintosh* from *Howe & McColough* was the nature of the information conveyed and the manner of its collection. In *Macintosh*, information which included private or confidential material gathered from and about third parties was being conveyed; in *Howe & McColough*, information about a transaction to which the maker of the statement was a party was passed on. In *Macintosh*, the fear was that inappropriate methods would be used to assemble the information; in *Howe & McColough*, the person who made the communication already possessed the relevant knowledge.

551 It is unnecessary to pursue the matter further, but having regard to the points of distinction postulated above between the situations in *Howe* and in *Macintosh*, it may well be the case that it is the latter that more resembles the situation in the present case.

552 I revert to consider briefly paragraphs (b), (c), (d), (g), (h) and (i) in alphabetical order.

Paragraph (b): The extent to which the matter published relates to the performance of the public functions or activities of the person

553 The defamatory matter involved in only one very minor way the plaintiff's relationship with any public institution, namely the matter of her using her work email for private purposes. However, taking that at its highest against the plaintiff, it is difficult to see how it could be said that it affected "performance of the public functions or activities of the plaintiff".³¹⁹

Paragraph (c): The seriousness of any defamatory imputation carried by the matter published

554 Perhaps the most direct way of approaching paragraph (c) is simply to note that the Judge awarded damages in the amount of \$100,000.00 (plus interest) and that the defendant does not now appeal in relation to quantum. By South Australian standards, that is a substantial award of damages for non-economic loss defamation.

Paragraph (d): The extent to which the matter published distinguishes between suspicions, allegations and proven facts

555 Bearing in mind that only publications after notice are relevant, the plaintiff's complaint is that Google continued to publish the defamatory matter

³¹⁹ Cf *Chappel v TCN Channel Nine P/L* (1988) 14 NSWLR 354 referred to above.

well knowing of its defamatory nature and without any attempt to add any disclaimer concerning the credibility or reliability of the matter or its authors.

Paragraph (g): The sources of the information in the matter published and the integrity of those sources

556 From the date of notification, Google was in a good position to assess the credibility and reliability of the authors of the material complained of. They apparently made no attempt to do so.

Paragraph (h): Whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person

557 The course of communications between the plaintiff and Google is noted above. Far from being concerned with the plaintiff's side of the story, it is evident that she was treated with contempt.

Paragraph (i): Any other steps taken to verify the information in the matter published

558 No such steps were taken.

Conclusion

559 The Judge determined:

[409] Subsection 28(3) of the Act provides a non-exhaustive list of circumstances that the court may take into account in determining whether the defendant's conduct was reasonable. They include the sources of the information in the matter published and the integrity of those sources and any other steps taken to verify the information in the matter published.

[410] Google published the material about Dr Duffy indiscriminately. It is only regarded as a publisher after it was notified of the defamatory material by Dr Duffy and refused to review or remove it. Its conduct is incapable of being characterised as reasonable in the circumstances.

560 I consider that reference to all of the facts and circumstances, including all of the matters referred to in s 28(3), confirms the Judge's conclusion that the defendant failed to establish that its conduct was reasonable in the circumstances.

THE RESPONDENT'S CROSS APPEAL

561 I would dismiss the respondent's cross appeal. I substantially agree with the reasons of the Chief Justice.

562 **HINTON J:** I have had the benefit of reading the judgments of Kourakis CJ and Peek J in draft. I agree with Peek J that the appeal should be dismissed. I agree with the reasons of the Chief Justice and his conclusions save in relation to the statutory defence of qualified privilege and insofar as my comments below differ on the question of whether the appellant was a subordinate publisher.

Publication and the Primary and Subordinate Disseminator

563 In *Thompson v Australian Capital Television Pty Ltd (Thompson)*³²⁰ Channel 7 re-broadcast live to air in the Australian Capital Territory a current affairs programme produced in the studios of Channel 9 in Sydney that included material defamatory of Mr Thompson. Mr Thompson instituted proceedings for defamation against Channel 7. In the High Court the question arose as to whether the defence of innocent dissemination was available to Channel 7.

564 The origin of the defence of innocent dissemination is generally traced to the decision of the Court of Queen's Bench in *Emmens v Pottle*.³²¹ In that case, which concerned the liability of a newsvendor for publishing defamatory material contained in a newspaper it sold, Lord Esher MR, with whom Cotton LJ agreed, said:³²²

The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care — the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel.

565 *Emmens v Pottle* was applied in *Vizetelly v Mudie's Select Library Ltd (Vizetelly)* where the proprietors of a circulating library were held liable for the publication of defamatory material in a book they sold, despite not knowing of the libellous content, because of a failure to take reasonable care to ensure that the book did not contain defamatory material.³²³

³²⁰ (1996) 186 CLR 574.

³²¹ (1885) 16 QBD 354.

³²² (1885) 16 QBD 354 at 357.

³²³ (1900) 2 QB 170.

566 It is to be noted that in *Emmens v Pottle* and *Vizetelly* the publisher who proved on the balance of probabilities that they did not know, and could not with the exercise of reasonable care have known, of the existence of the defamatory material in the publication was taken not to have published the material.

567 Returning to *Thompson*, the argument revolved around whether as a broadcaster Channel 7 should be treated in the same way as the newsvendor in *Emmens v Pottle*. After analysing *Emmens v Pottle* and *Vizetelly* Brennan CJ, Dawson and Toohey JJ determined that whether the defence was available to Channel 7 turned on whether it could be considered a subordinate publisher.³²⁴ They said:³²⁵

... There is no reason in principle why a mere distributor of electronic material should not be able to rely upon the defence of innocent dissemination if the circumstances so permit. In that respect we agree with Miles J in the Full Court who, agreeing with the trial judge, said:

“[T]here is no logical reason, in accordance with the ordinary processes of the development of the law through judicial decision, why the defence of innocent dissemination or innocent republication should be restricted to printed material and not extended to television broadcasts.”

(footnote omitted.)

568 As to whether Channel 7 was a subordinate publisher they said:³²⁶

The situation in the present case is that the broadcast of “The Today Show” was live to air from the studios of Channel 9 in Sydney. It was received by a microwave link at Channel 7’s transmitting site on Black Mountain in the Australian Capital Territory and relayed from there by a further microwave link to the studios of Channel 7 in the Australian Capital Territory. From those studios it was broadcast to viewers in the Australian Capital Territory and nearby parts of New South Wales. It is true that Channel 7 did not participate in the production of the original material constituting the program. But Channel 7 had the ability to control and supervise the material it televised. Channel 7’s answer is that time did not permit monitoring the content of the program between its receipt at Black Mountain and its telecast from the studios in the Australian Capital Territory. That may well be so but it by no means follows that Channel 7 was merely a conduit for the program and hence a subordinate disseminator. It was Channel 7’s decision that the telecast should be near instantaneous, a decision which was understandable given the nature and title of the program but which was still its decision.

Without, at this point, trespassing into the second question, namely, whether the defence of innocent dissemination was made out, the nature of a live to air current affairs program carries a high risk of defamatory statements being made. In those circumstances it would be curious if Channel 7 could claim to be a subordinate disseminator because it adopted the immediacy of the program. It did that for its own purposes, that is, to telecast to viewers in the Australian Capital Territory and adjoining areas. The agreement it made with PBL did not, as we have already observed, oblige Channel 7 to broadcast the

³²⁴ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 588.

³²⁵ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589.

³²⁶ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589-590.

program. Pursuant to the agreement, Channel 7 acquired a licence “to broadcast by television transmission only” episodes of a current affairs program, “The Today Show”. It broadcast for its own purposes, not as agent for PBL or Channel 9, and it “authorised” the broadcast in any meaningful sense that term has.

(footnote omitted.)

569 Thus, for Brennan CJ, Dawson and Toohey JJ the first question to be determined is whether the defence is available to a defendant and, thereafter, whether the defence is made out. The answer to the first question turns on whether the publisher is a subordinate publisher. Critical to answering that question was the consideration of the capacity of Channel 7 to inform itself of the content of the publication and to exercise editorial control over the material. Thus authorisation may be taken to include a voluntary act of publication, or participation in an act of publication, where the publisher or participant has the realistic ability to inform itself as to the content of the publication and to exercise editorial control in relation to the same. If the defendant has the realistic ability to inform itself as to the content of the publication and the practical capacity to exercise editorial control, the defendant is a primary publisher.

570 The inquiry undertaken as to the capacity of the publisher to inform itself of the content of the publication and exercise editorial control is objective. It does not turn on the subjective mental state of the publisher. Hence, earlier in their judgment, Brennan CJ, Dawson and Toohey JJ refer to the questions of the availability of the defence and whether it is made out as being “run together in some discussions of the matter”³²⁷ and to Romer LJ in *Vizetelly* as not treating the knowledge of the publisher as a separate question,³²⁸ before themselves separating out the two issues and dealing with the first.

571 It also follows from the joint reasons that the defence, if available and if made out, does not deny the act of publication, but rather confesses the physical element and avoids liability by establishing absence of the mental element (irrebutably presumed in the case of a primary publisher). In this connection Brennan CJ, Dawson and Toohey JJ quoted from *Duncan & Neill on Defamation*,³²⁹ seemingly with approval, who state:³³⁰

The plea of “never published” relied upon in *Emmens v Pottle* and later cases “has introduced a measure of confusion”. The authors of *Duncan & Neill on Defamation* comment:

“It is submitted that it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication.”

³²⁷ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 588.

³²⁸ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 588; *Vizetelly v Mudie’s Select Library Ltd* (1900) 2 QB 170 at 180.

³²⁹ (London: Butterworths, 2nd ed, 1983).

³³⁰ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586. See also *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [31] (Ribeiro PJ).

(footnotes omitted.)

572 Gaudron J proceeded from the understanding that the defence of innocent dissemination denies the act of publication. Hence her Honour rejected the rationale for the defence as proffered by the respondent:³³¹

The respondents contend that the rationale underlying the concept of “secondary distributor” is that the person in question does not participate in “the production, selection or composition of the matter” and does not have “the ability to exercise control or supervision over the material which makes up the matter published”. The difficulty with that submission is in relating it to some aspect of the law of defamation or, more precisely, some aspect of the law relating to publication, it being clear, as already indicated, that, for the purposes of the law of defamation, innocent dissemination does not constitute publication.

573 It appears that the rationale proffered by the respondents was accepted by Brennan CJ, Dawson and Toohey JJ and related to the physical act of publication. Despite this any real difference between Gaudron J, on the one hand, and Brennan CJ, Dawson and Toohey JJ, on the other, is difficult to discern. Her Honour said:³³²

There are cases involving communications between individuals which make it clear that liability does not attach to the accidental publication of defamatory matter. Thus, for example, the sender of a letter is not liable if it is intercepted and read by some unauthorised third person. The position is otherwise if the letter is opened by a servant or agent in the ordinary course of the addressee’s business and that possibility is known to the sender. Thus, as is put in *Gatley on Libel and Slander*, there is no publication if the communication was neither intentional nor due to any want of due care”.

However, it is in the area of mass communication that questions arise with respect to innocent dissemination. And in that area, publication is usually said to depend on authorisation or participation. Authorisation is also relevant to communication between individuals. A person who makes a defamatory statement to another and authorises or intends its repetition to some third person is liable for its repetition or, more accurately, publishes the statement to that third person. The matter was put succinctly by Isaacs J in *Webb v Bloch*, saying of *R v Cooper* that “[t]he judgments [in that case] show that all the defendant did was to authorise the publication of the libel, in law that he published it.”

It is well settled that a person is liable for acts done by a servant in the course of his or her employment or by an agent acting within authority or with ostensible authority, notwithstanding that he or she lacks knowledge of the acts in question. So too, a newspaper proprietor is liable in defamation even though the defamatory matter was published without his knowledge. As is pointed out in *Gatley*, “the editor is his servant and it is within the scope of his employment to send to the printers whatever matter he thinks ought to be published”. Given that knowledge is irrelevant to the liability of one who authorises another to act on his or her behalf, the rule with respect to innocent dissemination, which is postulated on the want of knowledge, can have no application to one who publishes by authorising the publication in question.

³³¹ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 594 (Gaudron J).

³³² *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 594-596.

In my view, it ought now be accepted that one who publishes by authorising a communication is not a subordinate distributor. Conversely, in my view, it ought also be accepted that one who does not authorise the communication but participates in it in some other way is a subordinate distributor and entitled to rely on the defence of innocent dissemination. To put the matter that way is simply to put a person who only participates in a mass communication on an equal footing with one who communicates defamatory matter to an individual. As already indicated, a person who communicates defamatory matter to another is liable only if the communication is intentional or negligent.

574 I do not understand Gaudron J to use the concept of authorisation any differently to Brennan CJ, Dawson and Toohey JJ. The last sentence of the final paragraph quoted may be understood as the state of mind necessary to a voluntary act of publication consistent with the observations made in the first paragraph of the quotation, as opposed to requiring proof of a state of mind additional to that which accompanies a voluntary, non-accidental act.

575 The fifth member of the Court in *Thompson* was Gummow J. His Honour did not address the question of whether Channel 7 was a subordinate publisher. For Gummow J that question was unnecessary to decide because even if Channel 7 was a subordinate publisher it had failed to make out the defence of innocent dissemination. In this regard his Honour quoted the following from the judgment of Burchett and Ryan JJ in the court below as not having been shown in any way to be in error. Burchett and Ryan JJ had said:³³³

However, if it [the defence of innocent dissemination] were available, in our opinion it has not been made out in the present case. [Channel 7] did not prove that exercise of due care which it was required to show ... The reality is that those who produced the programme were aware in advance of the nature of what would be said on it; and if Channel 7 was content to accept the producer as its agent in respect of the consideration of the propriety of televising the material, and the producer took no care, we do not see why Channel 7 should escape the consequences of the producer's knowledge. At any rate, it took no precautions of any kind, knowing the programme was a current affairs programme, a programme which by its nature would be likely to involve comments about persons.

... Whether it was feasible to monitor the programme for possible defamatory statements was simply not explored in evidence.

576 Implicit in Gummow J's approach is acceptance of the two-staged approach referred to in the joint reasons.

577 *Thompson* is binding on this Court. Further, none of the judgments in *Thompson* purport to state a rule limited in its application to broadcasters in the position of Channel 7.

578 In the light of *Thompson* it may be concluded that the elements of the tort of defamation differ depending upon whether the defendant is either a primary or subordinate publisher.

³³³ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 619-620; *Thompson v Australian Capital Television Pty Ltd* (1994) 54 FCR 513 at 520.

579 In *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* Ribeiro PJ, with whom Ma CJ, Chan PJ, Litton and Gleeson NPJJ agreed, identified the characteristics of the primary publisher as follows:³³⁴

In my view, the abovementioned characteristics supply the criteria for identifying a person as a first or main publisher. They are: (i) that he knows or can easily acquire knowledge of the content of the article being published (although not necessarily of its defamatory nature as a matter of law); and (ii) that he has a realistic ability to control publication of such content, in other words, editorial control involving the ability and opportunity to prevent publication of such content. I shall, for brevity refer to them as “the knowledge criterion” and “the control criterion” respectively.

580 Respectfully, I agree. The criteria identified by Ribeiro PJ accord with the approach of the joint reasons in *Thompson*.

581 Where the tort is committed by a primary publisher in the sense explained above, no mental element attaches to the act of publication (other than that necessary to establish the act to be voluntary), hence the first ingredient of the tort is,³³⁵ in so far as it applies to a primary publisher, one of absolute liability.³³⁶ This being so, the mental element attaching to the physical element of publication where the defendant is a primary publisher or disseminator, namely intent to publish, may be considered constructive and irrebutable.

582 A subordinate publisher publishes another’s material but does not have the realistic ability to acquire knowledge of the defamatory material and the practical capacity to exercise editorial control over the material prior to its publication. Despite this, the subordinate publisher of defamatory material is presumed to have published the material knowingly unless he or she can establish that they did not know, and could not reasonably have known, of the content of the material (the defence of innocent dissemination). Thus, the first ingredient of the tort, insofar as it applies to a subordinate publisher, is one of strict liability in that the plaintiff need not prove any mental element to succeed, but a defendant can avoid liability by proving that he or she did not know, and could not reasonably have known, that the publication was likely to contain defamatory material. So understood the subordinate publisher who succeeds in establishing that he or she did not know, and could not reasonably have known, that a publication was likely to contain defamatory material remains a publisher as the fact of their having committed the physical element remains established.³³⁷ It follows that I agree with the trial Judge that in the case of the subordinate publisher the mental

³³⁴ (2013) 16 HKCFAR 366 at [76].

³³⁵ Using the trial Judge’s distinction between ingredients and elements of ingredients.

³³⁶ Here I use the terminology of absolute and strict liability in the same sense as is used in the criminal law. As to the necessity to prove intent to publish, see *Day v Bream* (1837) 2 *Mood & R* 54; 174 ER 212; *Pullman v Hill & Co* [1891] 1 QB 524 at 527; *Emmens v Pottle* (1885) 16 QBD 354 at 357; *Byrne v Deane* [1937] 1 KB 818 at 837.

³³⁷ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 586 (Brennan CJ, Dawson and Toohey JJ); *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [31] (Ribeiro PJ, Ma CJ, Chan PJ, Litton and Gleeson NPJ agreeing).

element attaches to the physical element of publication, but I hastily add that it need not be proved by a plaintiff unless put in issue by the defendant.³³⁸

583 I note that the defence has been held to extend to relieving from liability the subordinate publisher who did not know, and could not reasonably have known, that they had published defamatory material or participated in the publication of defamatory material, but who, upon being informed of the fact of the publication, takes all reasonable steps to cease participation or publication as soon as reasonably practicable.³³⁹

584 From the above it follows that characterisation of a defendant as either a primary publisher or a subordinate publisher is determinative of whether a defendant may take advantage of the defence of innocent dissemination.³⁴⁰

585 I agree with the trial Judge that beyond the first and second ingredients of the tort as articulated by him, no further need arises to distinguish between primary and subordinate publishers.³⁴¹

586 Consistent with the above I would characterise the trespass cases³⁴² as involving a continuing act of publication by the trespasser during which the occupier becomes aware of the defamatory material and, by subsequent act or omission, may be said to adopt the publication as his or her own. In my view, the occupier becomes liable for the defamatory material not because of any failure to take reasonably practicable steps to prevent it being seen by others (save unless a duty exists), but because he or she, by act or omission joins in the act of publication after it first takes place and whilst it is continuing.³⁴³ In this connection, I use the concept of participation in the sense of the adoption, endorsement or promotion of the publication. A defendant cannot participate in another's act of publication by act or omission unless the defendant knows of the initial act of publication. Thus evidence showing that a defendant occupier was advised of the existence of a trespasser's publication may be the first step in proving subsequent adoption, endorsement or promotion by the occupier. Such evidence contributes to any inference that the occupier adopts, endorses or

³³⁸ *Duffy v Google Inc* (2015) 125 SASR 437 at [178].

³³⁹ *Oriental Press Group Ltd & Anor v Feaworks Solutions Ltd* (2013) 16 HKCFAR 366.

³⁴⁰ *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 588-589 (Brennan CJ, Dawson and Toohey JJ); *Oriental Press Group Ltd & Anor v Feaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [29] (Ribeiro PJ, Ma CJ, Chan PJ, Litton and Gleeson NPJJ agreeing).

³⁴¹ *Duffy v Google Inc* (2015) 125 SASR 437 at [179] (Blue J).

³⁴² See, for example, *Byrne v Deane* [1937] 1 KB 818; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81-127; *Hellar v Bianco* 111 Cal App 2d 424 (1952); *Scott v Hull* 259 NE 2d 160 (1970).

³⁴³ *Byrne v Deane* [1937] 1 KB 818; *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Reports 81-127; *Oriental Press Group Ltd & Anor v Feaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [31] (Ribeiro PJ, Ma CJ, Chan PJ, Litton and Gleeson NPJJ agreeing).

promotes the publication.³⁴⁴ But as Hunt J said in *Urbanchich v Drummoyne Municipal Council & Another*:³⁴⁵

In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.

587 If this analysis is correct, the occupier is a primary publisher where by their own act or omission they adopt, endorse or promote the publication.³⁴⁶

588 In any event, the trespass cases are an unnecessary distraction in this case. In my view the appellant in its operation of the Google search engine is not in a position analogous to the occupier in the trespass cases. This is because, unlike the trespass cases, the appellant does not adopt, endorse or promote another's publication, but commits the act of publication itself.³⁴⁷ If this is correct, Google's awareness or knowledge of another's act of publication does not arise for consideration. In this regard I agree with Beach J in *Trkulja v Google Inc (No 5)*³⁴⁸ and with the trial Judge when he said:³⁴⁹

I reject Google's contention that a defendant can only ever be a publisher if the defendant authorises or accepts responsibility for the publication. Such a test is apposite when the defamatory matter is physically attached to the defendant's property without the defendant's knowledge or permission, although in that case a better formulation of the test may be whether the defendant has acquiesced in the defamatory matter remaining on the defendant's property knowing that it will be seen by others. The posited test is not apposite when the defamatory matter is disseminated by the defendant itself and is inconsistent with the innocent dissemination doctrine. The appropriate test remains whether the defendant has participated in the publication. I agree with the decisions to this effect of Morland J in *Godfrey v Demon Internet Ltd*, Beach J in *Trkulja v Google Inc LLC (No 5)*, the Hong Kong Court of Final Appeal in *Oriental Press Group Limited v Fevaworks Solutions Ltd* and (subject to the issue of actual v constructive knowledge) the New Zealand Court of Appeal in *Murray v Wishart*.

(footnotes omitted.)

³⁴⁴ *Trkulja v Google Inc (No 5)* [2012] VSC 533 at [31] (Beach J).

³⁴⁵ (1991) Aust Tort Reports 81-127 at 69,193. See also *Byrne v Deane* [1937] 1 KB 818 at 837-838 (Greene LJ).

³⁴⁶ *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [48] (Ribeiro PJ, Ma CJ, Chan PJ, Litton and Gleeson NPJJ agreeing).

³⁴⁷ In this connection I agree with the analysis of Ribeiro PJ in *Oriental Press Group Ltd & Anor v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366 at [34]-[54].

³⁴⁸ [2012] VSC 533.

³⁴⁹ *Duffy v Google Inc* (2015) 125 SASR 437 at [184].

589 Bearing in mind the distinction between primary and subordinate publishers for the purposes of the tort of defamation, cases involving the use of the internet in the publication of defamatory material require careful analysis of precisely how a defendant engaged or used the internet.³⁵⁰ Analogies should be resorted to advisedly.³⁵¹ The cases indicate that whether a defendant is a primary or subordinate publisher may turn, for example, on whether the defendant is an internet service provider,³⁵² a blog or discussion platform host³⁵³ or a search engine operator³⁵⁴ and the nature of the operation undertaken in those capacities.³⁵⁵

590 The respondent's case at trial was that the operation of the Google search engine resulted in three distinct acts of publication – the publication of search results comprised of title, snippet and URL, the publication of the underlying web page subject of the hyperlinks contained in the search result, being the title and the URL, upon the searcher clicking on either link, and, in the publication of the content of past searches by virtue of the operation of the autocomplete function.

591 The Judge explained the generation of a search result by the Google search engine and the role played by the hyperlink comprising part of such result as follows:³⁵⁶

A user undertakes a Google Web Search by entering a word or words into the search box on the Google website. This results in the display of search results on the user's screen. Each search result consists of a paragraph (paragraph) comprising three parts:

- Title – a reproduction of a selection from the title of the underlying webpage;
- Snippet – a reproduction of a selection of text from the underlying webpage that contains the word or words the subject of the search;
- URL – the URL (or an elided version thereof where it is longer than one line) of the underlying webpage.

The title also operates as a hyperlink to the underlying external webpage. A hyperlink is a piece of HTML code inserted by the operator of the website currently being accessed (in this case Google): clicking the mouse on the hyperlink causes the browser to display a

³⁵⁰ *Murray v Wishart* (2014) 3 NZLR 722 at [125].

³⁵¹ *Murray v Wishart* (2014) 3 NZLR 722 at [126].

³⁵² *Bunt v Tilley* [2007] 1 WLR 1243; *Metropolitan International Schools Ltd v Design Technica Corporation and Others* [2011] 1 WLR 1743.

³⁵³ *Tamiz v Google Inc* [2013] 1 WLR 2151; *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350; *Oriental Press Group Ltd and Another v Fevaworks Solutions Ltd* (2013) 16 HKCFAR 366.

³⁵⁴ *Bleyer v Google Inc LLC* (2014) 311 ALR 529; *Google Inc v Trkulja* [2016] VSCA 333; *A v Google NZ Ltd* [2012] NZHC 2352.

³⁵⁵ See generally, D Lindsay, *Liability for the Publication of Defamatory Material via the Internet*, University of Melbourne, Centre for Media, Communications and Information Technology Law, Research Paper No.10 (March 2000); M Collins, *The Law of Defamation and the Internet* (New York Oxford University Press, 3rd ed, 2010) Chs 2 and 5.

³⁵⁶ *Duffy v Google Inc* (2015) 125 SASR 437 at [29]-[30], [32]-[34], [38]-[39].

webpage of a different website. In this case, clicking on the title results in the display of the webpage whose URL is displayed at the end of the search result.

...

The Google Search Engine compiles databases over historical time that are constantly being updated and are used by Google Web Search. The first stage is undertaken by a computer program called a web crawler or robot. The crawler program visits publicly available webpages on the web and downloads and retains a copy of the HTML code and any other code comprising the webpage together with meta data relating to the webpage. The frequency with which a given webpage is visited by the crawler depends on its relative importance as determined by computer algorithms and may vary from minutes or hours to weeks or months.

The second stage of compiling databases is undertaken by computer software known as an indexer program. The indexer program creates an index of each word found on webpages by the crawler program. The index records for each word a unique ID that is linked to the unique URL of each webpage on which that word has been found. The index also records data relating to each webpage, such as its nature, form and publication date, which is later used by the search program to rank results.

The databases compiled in these two stages are compiled automatically without human intervention. They are compiled by algorithms written by human beings.

...

The Google search program, in contradistinction to the crawler and indexer programs, operates in real time when a user initiates a word search on a Google website. It compiles a list of paragraphs (title, snippet and URL) relating to the webpages that contain the word or words entered by the user in the search box. If two or more words are entered, unless otherwise instructed by the user, it will only return results relating to webpages that contain all of the words entered. It ranks or prioritises the paragraphs in accordance with a ranking algorithm designed to present the most relevant results first. The ranking algorithm has regard to over 200 signals or factors, most of which are proprietary information. The search program displays 10 paragraphs or search results per page (screen) ranked in order by the ranking algorithm. The search program typically produces results in a fraction of a second and operates automatically in accordance with algorithms written by human beings.

The search program, and in particular the ranking algorithm, operates differentially between different Google country code domains. Subject to two exceptions, identical searches carried out at identical times by two different users in Australia on the Google Australian website return the same results in the same order. The first exception applies if the user has signed in to the Google system (entering username and password) and has enabled the feature "Web & App Activity". The second exception applies if the user has a specific cookie stored on the user's computer and linked to the browser and has not removed that cookie. If either exception applies, the search program will take into account the user's search history, at least over the previous 180 days, in applying the ranking algorithm.

(footnotes omitted.)

592 Neither party suggested on the hearing of the appeal that the Judge's understanding of the operation of the search engine was defective in any respect.

I would add one observation. The hyperlink comprised of the title to a search result may be described as a “deep” hyperlink, as opposed to a “shallow” hyperlink, in that it takes the searcher to the particular page as opposed to a page that features numerous articles.³⁵⁷

593 It was also the case that neither party challenged the Judge’s understanding of the operation of the autocomplete function. In that regard the Judge said:³⁵⁸

Google Web Search has an Autocomplete utility. As a user is entering a search term into the search box, it generates immediately below the search box alternative search terms based on past search terms entered by the user or by others. Google Web Search also has a Related Search utility. As a user is entering a search term into the search box, it generates at the bottom of the page alternative search terms based on past search terms entered by the user or by others.

Autocomplete and Related Search terms are both generated automatically in real time based on algorithms written by human beings. They operate differentially between different Google country code domains. Subject to one exception, identical searches carried out at identical times by two different users in Australia on the Google Australian website return the same Autocomplete or Related Search results in the same order. The exception applies if the user has signed in to the Google system and has enabled the feature “Web History”. If the exception applies, the Google search engine will take into account the user’s search history in applying the ranking algorithm.

594 When any of the Autocomplete search, search results or web page retrieved upon clicking on the hyperlink contained in a search result are presented to the searcher on the searcher’s computer, the physical element of the tort of defamation occurs. That physical element is made out by completion of the act of publication, namely, upon receipt by the publishee of the defamatory material communicated by the publisher.³⁵⁹

595 As to the search results, or paragraphs as the Judge defined such results, the Judge held:³⁶⁰

Paragraphs

The first issue that arises is whether the paragraphs (title, snippet and URL) displayed by the Google websites to users in response to searches for Dr Duffy’s name were published by Google. I take as an exemplar for this purpose the first paragraph extracted at [11] above, namely:

R1 Ripoff Report Janice Duffy – Psychic Stalker Psychics Beware Of...
Dr Janice Duffy is truly an embarrassment to her profession as a Senior Researcher in Adelaide Australia #2 Consumer Comment. Respond to this report...
www.ripoffreport.com/...Janice-Duffy.../janice-duffy-psychic-stalker-98d93.htm
Cached

³⁵⁷ M Collins, *The Law of Defamation and the Internet* (New York Oxford University Press, 3rd ed, 2010) at [2.43].

³⁵⁸ *Duffy v Google Inc* (2015) 125 SASR 437 at [41]-[42].

³⁵⁹ *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575.

³⁶⁰ *Duffy v Google Inc* (2015) 125 SASR 437 at [203]-[207], [210]-[213].

Google was the sole operator and controller of the Google website. The paragraphs resided on Google's website. The paragraphs were communicated by Google to the user conducting a search. Google played a critical role in communicating the paragraphs to the user. The physical element of publication is present. Google did not play the passive role of a mere conduit such as an internet service provider who merely provides access to the internet or a telecommunications carrier who merely provides access to the telephone network. Google played an active role in generating the paragraphs and communicating them to the user. The mere fact that the words are programmed to be generated because they appear on third party webpages makes no difference to the physical element. It makes no difference to the physical element whether a person directly composes the words in question or programs a machine which does so as a result of the program. I agree with the analysis of Beach J in *Trkulja v Google Inc LLC (No 5)* in this respect.

As to the mental element, Google intended to publish the paragraphs to the user. In addition, because Google was not a primary publisher, it is necessary that Google knew or ought to have known of the existence of the paragraphs. Google had no such knowledge before Dr Duffy's notifications in or in some cases after September 2009 and cannot be regarded as a publisher of the paragraphs before that time. However, if Google acquired knowledge of the paragraphs by reason of Dr Duffy's notifications and failed to remove them within a reasonable time thereafter, the necessary mental element will be present.

The mere fact that the paragraphs were generated automatically by Google's software programs does not prevent Google being a publisher of them *after* notification by Dr Duffy. If Google personnel were made aware of the existence of the paragraphs generated by Google's own software programs and failed to remove them, their continuing existence thereafter was the direct result of human action or inaction rather than merely the result of machine operation.

Approaching the question from first principles, Google was a secondary publisher of the paragraphs after notification and lapse of a reasonable time to allow for their removal (if that occurred).

...

Subject to considering Google's submission that the authorities on website forum hosts dictate a contrary result, I conclude that Google was a publisher of the paragraphs relating to Dr Duffy if and to the extent that Google failed to remove them after a reasonable time elapsed after effective notification by Dr Duffy.

Website forum hosts

Google contends that both principle and authority support the proposition that website forum hosts are not publishers of postings on their websites by third parties even after notification and non-removal, and that the position is similar or a fortiori in respect of paragraphs generated by search engines.

Website forum hosts operate websites that invite users to post articles and comments. They are analogous to notice boards in shops where the shop owner invites users to post notices and comments. As a matter of principle, such website forum hosts and shop owners are secondary publishers and liable for defamatory postings if they know of their content and do not remove them. I agree with the analysis of the Hong Kong Court of Final Appeal in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* in this respect.

The weight of authority supports this approach. This approach was taken by Morland J in *Godfrey v Demon Internet Ltd*, the English Court of Appeal in *Tamiz v Google Inc*, the Hong Kong Court of Final Appeal in *Oriental Press Group Limited v Fevaworks Solutions Ltd* and the New Zealand Court of Appeal in *Murray v Wishart*. In the last mentioned case, the New Zealand Court of Appeal held that actual and not merely constructive knowledge was required but nevertheless held that the host was a publisher after acquiring such knowledge and failing to remove the material.

(footnotes omitted.)

596 Subject to three qualifications, I agree. First, on my analysis, the appellant was a publisher in the sense that the physical element of publication was proven, both before and after notification. Second, acquisition of knowledge of the presence of defamatory material by the appellant does not mean that the mental element is present, rather it means that the appellant can no longer rebut the presumption of an intent to publish the material should it publish post-notification. Third, notification, and the lapse of a reasonable time to allow for the removal of the paragraphs, did not affect the appellant's status as a secondary or subordinate publisher, again, it merely affected the appellant's ability to make out the defence that was available to it as a secondary or subordinate publisher.

597 I also agree with the Chief Justice for the reasons that he gives that the appellant is a subordinate publisher of search results produced in response to a search inquiry made by a person using the Google search engine.³⁶¹

598 Accepting that the appellant was a subordinate publisher, notification of the fact of its publication of defamatory material in the event that a user of the Google search engine searched "Dr Janice Duffy" or "Janice Duffy" denied the appellant the ability to make out the defence of innocent dissemination at common law.³⁶² Accordingly, I agree with the Chief Justice that the Judge was right to limit the appellant's liability as a publisher of the relevant search results to those published after it was put on notice.³⁶³ I also agree with the Chief Justice that the defence of innocent dissemination at common law should be understood as excusing from liability the subordinate publisher who publishes defamatory material after notification is received of its likely existence provided such publication occurs in a period post-notification during which the secondary publisher may be said to have taken all reasonable steps to cease publication as soon as reasonably practicable.³⁶⁴

599 Turning to the question of whether the appellant published the underlying Rip-off Reports (the hyperlinked material), like the Chief Justice, I agree with the Judge's conclusions.³⁶⁵ I also agree with the Chief Justice's additional reasons.³⁶⁶

³⁶¹ At [180]-[183].

³⁶² *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342 at 346 (Morland J).

³⁶³ At [184].

³⁶⁴ At [183].

³⁶⁵ *Duffy v Google Inc* (2015) 125 SASR 437 at [221]-[230].

³⁶⁶ At [185]-[186].

The deep hyperlink taken with the snippet is more than a reference. The snippet entices and the hyperlink bespeaks a willingness on the appellant's part to transport the enticed searcher immediately to the relevant web page for more information – to publish the web page to those who, having read the snippet, want more information. In my view it is unnecessary to refer to the concepts of adoption or endorsement here. By transporting the enticed searcher to the web page upon the searcher clicking on the hyperlink contained in the search result the appellant publishes to the searcher the web page once it is opened. I agree with the analogy of handing over a bookmarked text, the invitation to provide it having been extended by the snippet and accepted upon clicking on the hyperlink. The position is also analogous to the circumstances in *Hird v Wood*.³⁶⁷

Qualified Privilege

600 The appellant does not appeal against the Judge's finding that the defence of qualified privilege at common law was not made out. The appellant confines itself to attacking the Judge's conclusion that the statutory defence of qualified privilege was not made out.

601 The Judge held:³⁶⁸

Google published the defamatory words indiscriminately to anyone who wanted to search for references on the web to Dr Duffy regardless of the person's purpose or interest: it may have been simply a matter of curiosity or otherwise not a matter of substance apart from its mere quality as news. The requirement that the recipients had an interest in having information on the subject is not satisfied.

Google contends that there is a public interest in the efficient availability of material on the web and in particular through the use of search engines. Whether or not that be so, a member of the public does not have an "interest" within the meaning of s 28(1)(a) in information on the web because it is on the web any more than a member of the public has an interest in reading information in a newspaper because it is in a newspaper.

For the same reasons, the alternative requirement that the recipients had an apparent interest is not satisfied.

Conduct reasonable in the circumstances

Section 28(3) of the Act provides a non-exhaustive list of circumstances that the court may take into account in determining whether the defendant's conduct was reasonable. They include the sources of the information in the matter published and the integrity of those sources and any other steps taken to verify the information in the matter published.

Google published the material about Dr Duffy indiscriminately. It is only regarded as a publisher after it was notified of the defamatory material by Dr Duffy and refused to review or remove it. Its conduct is incapable of being characterised as reasonable in the circumstances.

³⁶⁷ (1894) 38 Sol J 234.

³⁶⁸ (2015) 125 SASR 437 at [406]-[410].

602 The statutory defence is contained in s 28 of the *Defamation Act 2005* (SA).
It provides:

28—Defence of qualified privilege for provision of certain information

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the “recipient”) if the defendant proves that—
 - (a) the recipient has an interest or apparent interest in having information on some subject; and
 - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.
- (2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
- (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—
 - (a) the extent to which the matter published is of public interest; and
 - (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
 - (c) the seriousness of any defamatory imputation carried by the matter published; and
 - (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
 - (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
 - (f) the nature of the business environment in which the defendant operates; and
 - (g) the sources of the information in the matter published and the integrity of those sources; and
 - (h) whether the matter published contained the substance of the person’s side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
 - (i) any other steps taken to verify the information in the matter published; and
 - (j) any other circumstances that the court considers relevant.

- (4) For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.
- (5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

603 It may be observed; first, from the chapeau, that the burden of establishing the defence lies on the publisher. Second, the requirements of s 28(1) are cumulative. Third, the publisher must prove that the publishee possesses the requisite interest or apparent interest in a subject. Fourth, the distinction between an interest and an apparent interest is important. The former requires proof of an actual interest possessed by the publishee in the subject, whilst the latter requires proof of the publisher's belief that the publishee has an interest in the subject and that such belief was based on reasonable grounds. The latter cannot be defeated by proof that the publishee did not in fact possess such interest provided that the publisher's belief to the contrary was based on reasonable grounds. Importantly, to establish possession on the part of the publisher of a belief of an apparent interest based on reasonable grounds will require that the publisher, or someone who may be said to be part of the controlling mind of the publisher, give evidence of a belief actually held and the grounds on which such belief was held. Whether or not those grounds are reasonable will be for the trier of fact to determine in all the circumstances. It should also be made clear that the apparent interest is in information on the subject, not the defamatory matter – they may be the same thing, they may not. Fifth, the defamatory matter is published by the publisher as a consequence of giving the publishee information on the subject in which he or she has an interest or apparent interest. The defamatory matter may then comprise the information or be a component of the information. Sixth, if the publication is shown to be actuated by malice the fact that the defamatory matter was published in the course of giving information to the publishee on a subject in which he or she had an interest or apparent interest will not defeat a claim. This is because the publisher's motive is to harm the claimant's reputation which is not in keeping with the rationale underpinning the defence, namely, the publication and discussion of matters of public interest and importance. Seventh, to publish the information in return for payment does not defeat the statutory defence of qualified privilege. To receive payment in return for the publication of the information is also not to act contrary to the rationale underpinning the defence. Eighth, the act of publishing the information to the publishee must be reasonable in the circumstances. This is an objective assessment made upon determining the circumstances in which the publication was made. The factors referred to in s 28(3), and any other relevant circumstance, must be grounded in the evidence. Ninth, it has been said that s 28(1)(c) & (3) reflect the criteria articulated by Lord Nicholls of Birkenhead in *Reynolds v Times Newspapers Ltd & ors*.³⁶⁹ The weighing exercise contemplated is intended to confine interference

³⁶⁹ [2001] 2 AC 127 at 205.

with the freedom of expression and discussion on matters of public interest to only what is necessary in the circumstances.³⁷⁰

604 I return to s 28(1). It mirrors s 22(1) of the *Defamation Act 1974* (NSW).³⁷¹ In New South Wales it has long been held that s 22(1) was intended to widen the scope of the common law defence of qualified privilege.³⁷² Thus, an interest for the purposes of s 28(1)(a) is to be understood in its “broadest popular sense”.³⁷³ The difficulties that beset newspapers as discussed in *Morosi v Mirror Newspapers Ltd* were largely overcome by the introduction of the statutory defence and the expansion of the interest accounted for.³⁷⁴ Importantly the common law requirement that there be community of interest between publisher and publishee is not required by the statutory defence. In *Stone v Moore* Doyle J, with whom Kourakis CJ and Stanley J agreed, said:³⁷⁵

The intention of the statutory defence of qualified privilege is to broaden the nature of the interest which will found a defence relative to the common law. The focus is on the interest of the recipient rather than a reciprocity or community of interests. Again, the concept of interest is not to be narrowly or technically construed. It is used in the broader, popular sense of a matter of substance in which the relevant audience might legitimately have an interest in knowing, as long as that interest goes beyond being a matter of curiosity or prurient interest. The interest or apparent interest may be direct or indirect, but it must nevertheless be definite or tangible, and not vague or insubstantial.

(footnotes omitted.)

605 Despite the breadth to be afforded the type of interest that will fall within the ambit of s 28(1), interests that are prurient or amount to no more than curiosity have been held to be excluded.³⁷⁶ It could be said that it is unnecessary to confine the notion of what is an interest for the purposes of s 28(1)(a) in view of the weighing exercise required by s 28(1)(c). However, *Stone v Moore* and the New South Wales authorities that precede it on this question are binding. Neither party submitted to the contrary nor did either contend that the authorities that I have referred to were plainly wrong. So construing s 28(1) is not inconsistent with the stated objects of the *Defamation Act 2005* and the balance to be struck between protecting reputations on the one hand, and ensuring that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance on the other.³⁷⁷ I do not, with respect, consider that to limit the type of interest as indicated in *Stone v Moore* is to

³⁷⁰ *Reynolds v Times Newspapers Ltd & Ors* [2001] 2 AC 127 at 204-205 (Lord Nicholls of Birkenhead); *Defamation Act 2005* (SA), s 3.

³⁷¹ Parliament of South Australia, Hansard, Legislative Council, 14 September 2005 at 2541.

³⁷² *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 311-312; *Morosi v Mirror Newspapers Ltd* (1977) 2 NSWLR 749 at 797 (The Court).

³⁷³ *Barbaro v Amalgamated Television Services Pty Ltd* [1985] 1 NSWLR 30 at 40 (Hunt J).

³⁷⁴ (1977) 2 NSWLR 749 at 797.

³⁷⁵ (2016) 125 SASR 81 at [114].

³⁷⁶ See also *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 40 (Hunt J); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 311-312.

³⁷⁷ *Defamation Act 2005* (SA) s 3.

construe s 28(1) in a manner reflecting the common law defence. The expansion effected by the statutory defence is made plain in *Austin v Mirror Newspapers Ltd* and the rejection of the narrow construction proffered in that case by the plaintiff.³⁷⁸ Thus to construe s 22(1) in the manner that Hunt J did in *Barbaro v Amalgamated Television Services Pty Ltd*, which underpins Doyle J's conclusion in *Stone v Moore*, does not necessarily undermine the expansion intended by the statutory defence.

606 The appellant did not call anyone to give evidence to the effect that, post-notification by the respondent, the appellant possessed a belief based on reasonable grounds that Google search engine users searching "Dr Janice Duffy" or "Janice Duffy" had an interest in having the information provided in the relevant paragraphs and underlying web pages that was not prurient and amounted to more than curiosity. Thus the application of the statutory defence in this case turns on the actual interest possessed by Google search engine users searching "Dr Janice Duffy" or "Janice Duffy" between January 2010 and late 2010.

607 I agree with the Judge that the appellant published the content of the paragraphs and underlying web pages to anyone who chose to use the Google search engine and the relevant search terms.³⁷⁹ With the exception of Ms Palumbo, there was no direct evidence of the interest that those people who used the Google search engine to search "Dr Janice Duffy" and/or "Janice Duffy" had in making such searches during the relevant period (January 2010 – December 2010). The only evidence as to the searchers' interests is that which could be inferred from the fact that they deliberately entered those search terms.

608 In determining what may be inferred two things must be borne firmly in mind. First, as Sir Frederick Jordan said in *Carr v Baker*:³⁸⁰

The existence of a fact may be inferred from other facts when those facts make it reasonably probable that it exists; if they go no further than to show that it is possible that it may exist, then its existence does not go beyond mere conjecture. Conjecture may range from the barely possible to the quite possible. Inferences of probability may range from a faint probability - a mere scintilla of probability such as would not warrant a finding in a civil action: *Hiddle v. National Fire & Marine Insurance Co. of N.Z.* - to such practical certainty as would justify a conviction in a criminal prosecution.

...

It is well established that if there is no piece of evidence which, taken at its highest, is more than equally consistent with the existence and with the non-existence of a fact, it cannot be treated as established: *Cofield v. Waterloo Case Co. Ltd.*

(citations omitted.)

³⁷⁸ *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 311.

³⁷⁹ *Duffy v Google Inc* (2015) 125 SASR 437 at [400].

³⁸⁰ *Carr v Baker* (1936) 36 SR (NSW) 301 at 306-307.

609 Second, whether or not an inference may be drawn from objective facts will depend in no small part upon a judge's assessment of the common course of human affairs.

610 To the fact of the search terms used may be added the time period in which they were used and in relation to which the appellant was found to be liable – January 2010-December 2010. To this may be added that the evidence established that the last post on the Ripoff webpage was dated January 2009 and that as at that date the controversy between the respondent and the various psychics had ended, at least to the extent that no further postings or similar posts on the web were made until the respondent began her blog in October 2011. Further, this matter and the underlying controversy did not attract media attention until November 2011. Thus, the at least 100 monthly searches for “Dr Janice Duffy” and at least 200 monthly searches for “Janice Duffy” found by the trial Judge to have been made between October 2009 and February 2011³⁸¹ were made during a period where it cannot be inferred that they were prompted by any media attention. Further, the publications for which Google was held liable occurred during a period commencing twelve months after the last post was made on the Web in the controversy with the psychics. In those circumstances, it is unlikely that the relevant searches were prompted by a desire to follow that controversy. It had ended, and ended sometime ago. Absent the media attention that these proceedings subsequently attracted, or commencement of the respondent's blog and any attention it attracted, what would have triggered the at least 100 monthly searches for “Dr Janice Duffy” and the at least 200 monthly searches for “Janice Duffy” made in the period January 2010 to December 2010?

611 Clearly it may be inferred that the search engine user who used the search terms “Dr Janice Duffy” and/or “Janice Duffy” had an interest in information about the respondent. That is, the subject for the purposes of s 28(1) is “Dr Janice Duffy” and “Janice Duffy”. The ranking algorithm strengthens such inference.

612 The search terms used do not allow one to characterise the searcher's interest as anything less than an interest in the respondent. That said, it is highly improbable that the search engine users did not have a narrower interest in the respondent – *i.e.* an interest in the respondent for a particular purpose or reason. With respect to the 100 monthly searches for “Dr Janice Duffy” the searcher used the respondent's title, suggesting a greater knowledge of the subject than the user of the “Janice Duffy” search term, and a narrower interest.

613 Under s 28(1)(b) the information provided on the subject must be germane to the interest. It follows that in the circumstances of this case the appellant must establish that the Google search engine users' interest in information on the respondent included an interest in obtaining information on her involvement with the relevant psychics. That is because it was information of her involvement with the relevant psychics that was conveyed by the paragraphs and underlying web

³⁸¹ *Duffy v Google Inc* (2015) 125 SASR 437 at [310].

pages and which included the defamatory material. In my view the evidence does not allow one to so conclude.

614 I accept that it is possible that some of those who searched “Dr Janice Duffy” and “Janice Duffy” might have fallen within a class of persons who used internet psychics and/or who had an interest in internet psychics and their integrity. However, there is no evidence that allows one to determine how likely this possibility is. On the assumption that the respondent was unknown to these people (there being no evidence to suggest otherwise), why would they search her name in the period January 2010 – December 2010? To follow the controversy they must have been alerted to it. As I have mentioned the controversy entered an hiatus in January 2009 with the last posting on the sixth Rip-off Report. By the time of the relevant publications the controversy had long been in abeyance. To hypothesise that this class of Google search engine users obtained the respondent’s name in some way that then led to them using the specific search terms during this period without any obvious prompt or motivation is speculative. In my view, the evidence does not support a conclusion on the balance of probabilities that a number of those to whom the paragraphs and underlying web pages were published in response to the search terms “Dr Janice Duffy” and “Janice Duffy” as found by the trial Judge fell within a class of persons who used internet psychics and/or had an interest in internet psychics and their integrity and thus had a relevant interest for the purposes of s 28(1)(a).

615 I do not think that so concluding undermines the conclusion arrived at by the trial Judge as to the number of searches undertaken. That conclusion was arrived at via a reasoning path that was not dependent in any way upon the identity of the searcher. Here the inability to draw the suggested inference is merely a product of the evidence.

616 As a matter of probability it is highly likely that a number of the search engine users who used the relevant search terms were either in, or considering entering into, a professional, commercial, employment or personal association with the respondent. It is possible that a number of these people had an interest in knowing about the respondent and her relationship with psychics, but not all, and what proportion cannot be discerned. I do not accept that an interest in a person arising from a contemplated or continuing professional, commercial, employment or personal association necessarily carries with it an interest in all information that may be obtained about such person. Just because they contemplate or share a relationship does not mean that the information is germane to the fabric of the contemplated or shared relationship.

617 Peek J has referred to the appellant’s employment and academic history. It is entirely possible that a user of the Google search engine who entered the search terms “Dr Janice Duffy” or “Janice Duffy” during the relevant period was interested in work that she had done or been involved in and upon which her

involvement with psychics had no bearing. Ms Palumbo falls into this class, at least in relation to the search she conducted in and around June 2010. It cannot be inferred that members of this class had an interest in the paragraphs published during the relevant period to those Google search engine users who used the relevant search terms. If, for example, a person used the Google search engine to search for information on smoking to which the respondent contributed, they might be concerned to understand the authoritative nature of the publication, the robustness of the authors' research, and the qualifications and experience of the authors. I cannot see how such person could have a relevant interest in the fact that the respondent consulted psychics and subsequently became embroiled in a controversy with those psychics during which she behaved, at times, appallingly.

618 In my view the evidence does not establish the requisite interest possessed by those who used the Google search engine and searched "Dr Janice Duffy" or "Janice Duffy" during the relevant period.

619 Turning to the interest possessed by those who clicked on the hyperlink and were transported to the underlying web pages, in light of my conclusion that the evidence does not establish the requisite interest possessed by those Google search engine users who used the relevant search terms, curiosity as the then motivating reason for proceeding to the web pages cannot be eliminated. Again Ms Palumbo is an example. As the majority said in *Stone v Moore*, the interest must be beyond curiosity. As to what other interest may have existed, there is no evidence.

620 In my view, the Judge was right to reject the statutory defence of qualified privilege on the basis that the appellant had failed to prove the relevant interest for the purposes of s 28(1).

621 If I am wrong, I would, in any event, agree with the Judge for the reasons he gives that the appellant's conduct after notification cannot be characterised as reasonable. I also agree generally with Peek J's reasons on this issue.

622 The appellant contends that making a search engine operator liable for defamatory material published in search results and linked web pages will result in over-blocking. That is, not being the author of the web page and having no means of evaluating the truth or otherwise of any defamatory material, the search engine operator will block the web page URL rather than run the risk of a defamation action. That places the search engine operator in the position of censor which is antithetical to freedom of expression and should be avoided. To accede to the appellant's submission would, however, result in the conferral of immunity upon search engine operators from suit for defamation.

623 I readily accept the great benefits that the internet and search engine operators bring to society and the world generally. But the positives carry with them negatives. The damage to reputation that may occur consequent upon a

defamatory posting that is available to all internet users viewed many times over and disseminated uncontrollably may be catastrophic.

624 The argument must be kept in proportion. If there are over sixty trillion web pages in existence and greater than 100 billion searches each month conducted on the Google search engine, I very much doubt that liability of a search engine operator for the publication of defamatory material post-notification and after the passing of a reasonable time to take action will have a chilling effect on the freedom of expression. If I am wrong, it is in my view for the legislature to intervene.

625 Bearing in mind the period of time that lapsed post-notification and prior to action being taken, and the appellant's conduct in that post-notification period, I do not think it can be said that it was reasonable to publish the relevant paragraphs and underlying web pages. The publications do not concern matters of public interest generally. To say that the appellant's only option was to remove the offending URL seems extreme, particularly in the light of the experience in the European Union and the availability of search query blocking. Once notified of the search chain the appellant was on notice that the paragraphs and underlying web pages were being published to persons with no relevant interest in the subject matter. I appreciate that blocking the particular URL does not remove the webpage from the Web with the consequence that it may resurface via a different search route or after an alteration to the URL. But publication by way of a different search route is a fresh act of publication in relation to which the innocent dissemination defence may apply afresh.

626 Arguably proving publication in the way that the respondent did could result in unfairness to a defendant contemplating running the defence of qualified privilege at common law or under the *Defamation Act 2005*. In this case the fact of publication was proven and no complaint was made at trial of any unfairness. In some ways the postulated unfairness arises from the nature of the appellant's undertaking. I would not be prepared to hold without hearing full argument that the antidote is to require proof by the plaintiff of the actual identity of those to whom defamatory material is published. In my view the innuendo cases provide no suitable analogy. To require proof of actual identity may well result in unfairness to people defamed by others using the internet; how is the identity of the author of the defamatory material posted on a web page to be proved?

627 I would dismiss the appeal.

