

DEFAMATION ON THE INTERNET

Mr Justice Robert Ribeiro¹

Obligations VII Conference

The Common Law of Obligations: Divergence and Convergence

University of Hong Kong 15 July 2014

1. It is a great privilege and pleasure to have been asked to address this distinguished Conference. Given its theme – convergence and divergence in the law of obligations – I thought I might examine a developing area of the law. Hence my choice of topic.
2. The law of defamation seeks of course to protect individuals against unwarranted harm to their reputation. The internet has created new ways of damaging reputations. The law must therefore seek appropriate responses. In doing so, it must avoid damaging free expression on the internet.

The act of publication

3. A person's reputation consists of what others think of her or him. That reputation is harmed when someone publishes a statement to others which, as Lord Atkin famously put it, tends to lower the individual concerned "in the estimation of right-thinking members of society generally".² The act of publication is what does the damage. It is that act which is at the heart of the law of defamation.

¹ Permanent Judge, Hong Kong Court of Final Appeal. I would like to thank Mr Frank Choi Fai-ki, a Judicial Assistant at the Court of Final Appeal, for his valuable assistance in preparing this paper. I would also like to thank Mr Andrew McLeod, Stipendiary Lecturer in law at Lady Margaret Hall, Oxford, for his insights into the Australian position.

² *Sim v Stretch* (1936) 52 TLR 669 (HL) at 671.

4. The common law principles have largely been developed in relation to publications in the print medium. With the advent of mass circulation newspapers in the 19th century, much greater injury could be caused by a defamatory statement. This was accentuated in the 20th century by the development of radio and television.
5. Those traditional forms of mass media take what has been called a “one-to-many” form of communication. Information originating from a single source is published to many recipients. The originating entity has editorial control over content and the power and opportunity to decide whether the item should be published.
6. The internet, however, has provided new ways to communicate – and inevitably – new ways of publishing defamatory matter. I shall touch on two aspects which have raised novel and difficult legal issues. First, I will deal with the liability of internet intermediaries who provide platforms for exchanges among their users. And secondly, I shall consider the liability of those who provide internet search engines.

Liability of internet intermediaries

7. Internet intermediaries play a role that is essential to the functioning of the internet as we know it. To quote Professor Jack Balkin, they are entities which:

“... do not necessarily broadcast but facilitate the speech of others, and instead of being a one-to-many, they are many-to-many forms of communication. They include not only broadband companies, but also a whole range of online service providers, like YouTube, Blogger, and their parent company Google; social networking sites like MySpace and Facebook; Flickr, a photo-sharing service owned by Yahoo; and virtual worlds like Second Life. These online service providers offer platforms through which people can find

content, create new content, transform existing content and broadcast the content to others ... a key element of their business models is providing widespread, democratized, access to media and encouraging participation. That is because their business models depend on user-generated content ...”³

8. Such interactivity is now ubiquitous. There are discussion forums and blogs expressing and inviting views on every conceivable subject. Online editions of newspapers encourage readers to comment on articles. Television presenters ask viewers to “tweet” their reactions. Customers are invited to review books, products, restaurants, hotels and so forth. But what happens if the reviews or comments contain statements defamatory of some person? Often the authors may be unknown or not worth suing. Should the person who provided the platform hosting their comments be held liable as publisher of the defamatory statements? How is the balance to be struck between free expression and protection of reputation in such cases?
9. As it happens, the issue of intermediary liability reached the Hong Kong Court of Final Appeal a year ago in a case called *Oriental Press Group v Feaworks*.⁴ It is interesting to compare its approach with that adopted by the English Court of Appeal in *Tamiz v Google Inc*,⁵ which had been decided some five months earlier.

³ Knight Professor of Constitutional Law and the First Amendment, Yale Law School. Paper prepared for the Global Constitutionalism Seminar, 2010, Yale Law School, adapted from Jack M Balkin, “Media Access: A Question of Design,” 76 *George Washington L Rev* 933 (2008).

⁴ *Oriental Press Group Ltd v Feaworks Solutions Ltd* (2013) 16 HKCFAR 366.

⁵ [2013] 1 WLR 2151.

The Oriental Press Group case

10. The defendants in the *Oriental Press Group* case maintained a website which hosted one of the most popular discussion forums in Hong Kong, known as the “Golden Forum”. It often had some 30,000 users online, with over 5,000 messages being posted each hour. Anyone could browse the site but only registered members could post items on the forum. There were rules including a prohibition of defamatory posts, but no attempt was made to edit or filter posts before they appeared on the forum. Two administrators were employed to remove objectionable content. Violation of the rules could result in suspension or termination of membership.
11. The *Oriental* case arose out of three discussion threads posted in 2007, 2008 and 2009 respectively. They contained highly defamatory statements accusing the plaintiffs of involvement in drug trafficking and money laundering and even complicity in murder. The defendants were unaware of those posts until the plaintiffs threatened proceedings concerning the 2007 and 2008 statements. The defendants removed the 2008 posts from the website about 3½ hours after receiving the complaint. But the 2007 posts were not taken down until some eight months later. The defendants themselves subsequently discovered the 2009 statements and immediately took them down, about 12 hours after they had been posted.
12. The plaintiffs were awarded \$100,000 damages for the 2007 statements – an award which the defendants did not appeal. However, the plaintiffs’ claims regarding the 2008 and 2009 posts were dismissed at trial and their appeal to the Court of Appeal failed. The issue of whether such an

intermediary should be held liable for the defamatory posts of its forum users therefore came before the Court of Final Appeal.

13. The Court approached the case by asking whether the forum hosts qualified as publishers of the libel and if so, whether they could rely on the common law defence of innocent dissemination. It is a defence established at the turn of the twentieth century to mitigate the harshness of the strict, pre-existing rules on publication. A defendant had previously been held liable as a publisher if by an act of any description, he could be said to have intentionally assisted in conveying the defamatory statements to a third party. It did not matter that he did not know that the article contained the offensive words and it was irrelevant that he had acted with reasonable care.⁶ All who participated in the process of distribution were jointly and severally liable for the entire damage suffered by the plaintiff, regardless of the degree of responsibility each had for the publication.⁷

14. The innocent dissemination defence was formulated in the judgment of Romer LJ in a case called *Vizetelly v Mudie's Library*,⁸ reported in 1900. His Lordship held that a person who was not the printer⁹ or the first or main publisher of a libellous work, but who had taken a subordinate part in its dissemination, had a defence if he could show that he did not know

⁶ *Vizetelly v Mudie's Select Library* [1900] 2 QB 170 at 179; *Godfrey v Demon Internet Ltd* [2001] QB 201 at 207 per Morland J; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at §25.

⁷ Gately on Libel and Slander (Sweet & Maxwell, 12th Ed), §6.11.

⁸ [1900] 2 QB 170 at 180. It drew on the earlier decision of Lord Esher MR in *Emmens v Pottle* (1886) 16 QBD 354.

⁹ As to printers, see *Oriental v Fevaworks* at §§79 and 80.

that the work disseminated contained the libel and that his lack of knowledge was not due to any negligence on his part.

15. The defence has been adopted in jurisdictions including Australia, New Zealand, Canada and Hong Kong. It has two central features. First, it is only available to secondary publishers. Those considered “first or main publishers” cannot rely on it. And secondly, in relation to secondary publishers, it replaces strict liability with liability only where they knew or ought reasonably to have known that the article contained the defamatory matter.
16. The Court held in the *Oriental* case,¹⁰ that knowledge and control provide the criteria for differentiating between the two classes of publishers: A primary publisher is someone who knows or can easily acquire knowledge of the content of the article being published (although he may not know that it is defamatory as a matter of law). He also has editorial control plus the ability and opportunity to prevent publication. On that basis, the Court concluded that the forum providers were not first or main publishers but were subordinate publishers eligible to rely on the defence.
17. On the facts, the Court decided that *before* they were notified of the plaintiffs’ complaint, the defendants were protected. Since there was no realistic means of vetting for libel the 5,000 messages posted every hour, the Court was satisfied that they did not know and, without negligence on their part, did not have any reason to suppose that the libels had been posted.
18. But what about their position *after* they received complaints about the defamatory posts? In an internet case like *Oriental*, the discussion thread

¹⁰ At §76.

is likely to receive “hits” and so to be published afresh to persons accessing that content, after the complaint has been received but before the libellous material is removed. Is the innocent dissemination defence available to the intermediary in such circumstances?

19. The Court of Final Appeal decided that it is available, provided that the intermediary proves that upon learning of the defamatory posts, he took all reasonable steps to take them down as soon as reasonably practicable. The standard of reasonableness was therefore applicable both before and after becoming aware of the offending posts. The Court concluded that the 2008 and 2009 statements were taken down sufficiently promptly to retain the protection of the innocent dissemination defence and dismissed the plaintiffs’ appeal.

Tamiz v Google Inc

20. The English Court of Appeal adopted a somewhat different approach in *Tamiz v Google Inc*.¹¹ Google Inc (“Google”), a Delaware corporation with its main place of business in California, was the intermediary sued. On its website known as Blogger.com, Google provided a platform for users to create blogs expressing their own views and inviting the comments of others. Google did not exercise any prior control over what appeared on Blogger.com, but it had rules about permitted content and was able to remove or block access to offending material to which its attention was drawn.
21. In April 2011, Mr Tamiz complained that a blogger had defamed him on Blogger.com. Google forwarded his complaints to the blogger who

¹¹ *Tamiz v Google Inc* [2013] 1 WLR 2151 (Lord Dyson MR, Richards and Sullivan LJ).

voluntarily removed the offending comments some 3½ months after complaint was made. Mr Tamiz sued Google for libel in respect of the period before removal and sought permission to serve the claim out of the jurisdiction. The issue was whether there was an arguable claim against Google to justify granting such permission.

22. Richards LJ, writing for the Court of Appeal, held that Google was not a primary publisher since it did not create or have any prior knowledge of, or effective control over, the content of the blog.¹² He doubted whether Google could be regarded as a subordinate publisher but nevertheless held that *before* receiving Mr Tamiz's complaint, Google had a defence at common law because it did not know and would not, by exercising reasonable care, have known that the publication was defamatory. It seems to me that that defence is in substance the innocent dissemination defence although it was not described as such. His Lordship also held that Google had an unassailable defence under section 1 of the UK's Defamation Act 1996 which gives statutory form to the common law defence.¹³
23. Similar statutory provisions exist in each of the Australian States and Territories.¹⁴ New Zealand has the equivalent in section 21 of its Defamation Act 1992. But Hong Kong has not enacted such a provision.

¹² At §25.

¹³ Section 1(1): "In defamation proceedings a person has a defence if he shows that (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement."

¹⁴ Civil Law (Wrongs) Act 2002, section 139C (ACT); Defamation Act 2005, section 32 (NSW); Defamation Act 2006, section 29 (NT); Defamation Act 2005, section 32; Defamation Act 2005, section 30 (SA); Tasmania: Defamation Act 2005, section 32; Defamation Act 2005, section 32 (Vic); Defamation Act 2005, section 32 (WA).

However, those provisions do not alter the common law defence and do not affect the present discussion.

24. Although the Courts in *Tamiz* and *Oriental* converged in substance on *pre*-notification liability, they diverged on the question of *post*-notification liability. As we have seen, in Hong Kong, the Court extended the innocent dissemination defence to afford a reasonable time for taking down the offending words, but Richards LJ turned to quite a different principle. He drew on a line of cases involving notice boards and graffiti.
25. Three well-known cases illustrate that principle. The first is the 1937 decision of the English Court of Appeal in *Byrne v Deane*.¹⁵ A member of a golf club who objected to fruit machines on the premises had them taken away by the police on the ground that they were unlawful gambling machines. Someone then pinned a sheet on the club's notice board attacking (in verse) the member who had made the report. There was a rule that no notice should be posted without the club secretary's consent. The plaintiff claimed that he was defamed by the notice and sued the proprietors of the club, one of whom was the club secretary. No one had sought her consent to put up the notice, but she had allowed it to remain on the notice board since she could see no harm in it. The English Court of Appeal noted that posting the notice without consent was an act of trespass, but concluded that after its discovery, the secretary had adopted it and made herself responsible for its publication.¹⁶

¹⁵ [1937] 1 KB 818.

¹⁶ The defendants, however, escaped liability because the words did not bear a defamatory meaning.

26. Next, there is the 1952 decision of the California District Court of Appeal in *Isabelle Hellar v Joe Bianco*.¹⁷ Someone had scrawled a defamatory message on the wall of the men's lavatory in a bar. The Judge described it as "libellous matter indicating that the appellant was an unchaste woman who indulged in illicit amatory ventures", giving her telephone number. After someone called Ms Hellar at that number, her husband telephoned the bartender giving him 30 minutes to remove the offending words. The bartender said he was too busy and would get round to removing it in due course. Applying *Byrne v Deane*, the Court held that "by knowingly permitting such matter to remain after reasonable opportunity to remove the same, the owner of the wall or his lessee [was] guilty of republication of the libel".
27. The third example is the 1991 case of *Urbanchich v Drummoyne Municipal Council*,¹⁸ in the Supreme Court of New South Wales. The plaintiff was the leader of an extreme right wing group who sued the Urban Transit Authority for libel on the basis that posters purporting to depict him in the company of Adolf Hitler and others in Nazi uniforms had been glued onto bus shelters controlled by the Authority. Although asked to remove them, the posters were allowed to remain in place for at least a month. Hunt J held that there was a sufficient case to go to the jury since the plaintiff might be able to establish liability by showing that the defendant had consented to or ratified the continued presence of the defamatory statement on its property enabling others to read it.¹⁹

¹⁷ (1952) 244 P 2d 757.

¹⁸ (1991) Aust Torts Reports §81-127.

¹⁹ At 69,193.

28. In *Tamiz*, Richards LJ thought that provision of a platform for bloggers was equivalent to the provision of a notice board.²⁰ He held that if Google allowed defamatory matter to remain on a Blogger.com blog after being informed of its presence, it might be found to have made itself a publisher of the material.²¹

Divergence and convergence in the views of the two Courts

29. In the *Oriental* case, the Hong Kong Court considered the *Byrne v Deane* approach unsuitable for dealing with internet intermediaries. It took the view that such intermediaries *do* participate in a real sense in the dissemination of items posted on the platforms provided. They register users as members, lay down rules for participation and encourage visitors to browse the site. They often rely on advertising income and aim to maximise traffic on their sites. It is legitimate to make the availability of the innocent dissemination defence conditional on them proving that they did not know and did not have reasonable grounds to be aware of the defamatory matter posted by their users.
30. But occupiers of premises like the golf club, the bar and the bus shelters are in quite a different position. People who deface their walls with graffiti or pasted posters, or who pin scurrilous items onto their notice boards contrary to club rules, are trespassers. Such occupiers are not treated as publishers of the defamatory messages unless the plaintiff

²⁰ *Tamiz* at §33.

²¹ *Tamiz* at §34. Some support for the *Tamiz* approach can be found in two earlier first instance interlocutory decisions. In the New Zealand case of *Sadiq v Baycorp (NZ) Ltd* [2008] NZHC 403; where Associate Judge Doogue cited *Byrne v Deane* and said that he could see “no reason why a parallel process of reasoning should not be applied to the presence on websites of defamatory material” (at §48). And in England, in *Davison v Habeeb* [2011] EWHC 3031 at §38; HH Judge Parkes QC considered *Byrne v Deane* and likened the website Blogger.com to “a gigantic notice board”.

proves that they adopted or ratified the defamatory statements. The *Byrne v Deane* line of authority is not concerned with innocent dissemination. It is concerned with persons who are not participants in the dissemination of statements by others but who, by their ratifying conduct, convert themselves into publishers of the defamatory graffiti or notices. If they know about and adopt the publication of the libellous content, they become primary publishers, leaving no room for the defence of innocent dissemination.

31. In *Tamiz*, the Court of Appeal appears to have considered it possible effectively to adopt *both* the innocent dissemination defence (applying it to the period before Google became aware of the posts) and the *Byrne v Deane* approach (applying it after notice was received). But it seems to me that those two principles cannot comfortably be combined. They address different issues; apply different standards in judging the defendant's conduct, and impose different burdens of proof.
32. But notwithstanding such divergence, a large measure of *convergence* can be seen in the outcome of the *Tamiz* and *Oriental* decisions. Both Courts rejected the suggestion that the internet intermediaries were primary publishers subject to strict liability. They both held that the enormous volume of traffic on their discussion platforms meant that the intermediaries were not negligent in failing to detect and remove the defamatory material before they were made aware of the libellous matter since they could not reasonably have been expected to filter or edit the posts beforehand. Both Courts then went in search of an appropriate principle for dealing with the intermediaries' position *after* they became aware of the objectionable material. It was only at that point that their approaches diverged. But there was nonetheless convergence as to the practical outcome. Both Courts held that liability was avoided if the

intermediary promptly took down the offending posts after becoming aware of the offensive matter.

33. Looking to the future, the question of what constitutes reasonable conduct is likely to be a frequent issue. It will often be reasonable to adopt a notice and take down policy. But sometimes it may not be good enough just to sit back and wait for complaints. If, for instance, the intermediary knows that someone has been repeatedly targeted for defamatory attacks on its platform, the standard of reasonableness may require a more proactive stance.
34. Some platforms may be inherently likely to attract defamatory statements. For example, in *Kaplan v Go Daddy Group*,²² a decision of the New South Wales Supreme Court, a customer dissatisfied with his car dealer started a blog provocatively called “www.hunterholdensucks.com” and encouraged others to share their views. Unsurprisingly, some extremely negative comments were elicited, defamatory of the dealer. Similarly, in *Wishart v Murray*,²³ a decision of the New Zealand High Court, the defendants set up a Facebook page campaigning for a new book to be boycotted, making seriously defamatory allegations against one of the authors. The creators of such sites might reasonably be required to exercise particular care given the obvious risk of attracting defamatory comments.
35. Reasonableness may also depend on the quality of the information provided by the complainant. A vague complaint which does not enable the intermediary readily to identify the offending posts or to understand why they are said to be objectionable may well sustain the intermediary’s

²² [2005] NSWSC 636.

²³ [2013] NZHC 540.

defence. At the same time, the intermediary might reasonably be expected to provide an accessible procedure for reporting abuse.

36. Even after receiving a complaint, an internet intermediary may be unable to tell whether a post is defamatory or, if defamatory, whether it is lawful. How could they, for example, know whether the statement is true or is a matter of honest comment? An intermediary may therefore be inclined to play it safe and so automatically take down all posts which are made the subject of complaint. But it is an important social value that certain kinds of wrongdoing should be publicly exposed. Freedom of expression embraces the making of defamatory statements if they are true or represent honest comment on matters of public interest. A simple notice and take down rule is therefore less than ideal.
37. In some jurisdictions, the vulnerable intermediary is given statutory protection. In the United States, section 230 of the Communications Decency Act 1996²⁴ confers a general immunity on internet intermediaries against being treated as publishers of content created by someone else.
38. However, such a blanket immunity may be thought to go too far, giving insufficient weight to the protection of one's reputation. A more nuanced approach can be found in sections 5 and 10 of the United Kingdom's Defamation Act 2013 which came into operation on 1st January this year. Those sections, together with Regulations made under the Act, require plaintiffs to pursue the originator of an offending post and restrict actions against internet intermediaries to cases where the plaintiff cannot identify

²⁴ 47 US Code §230(1): "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

the originator. Those provisions do not do make the common law principles irrelevant since website operators who are unable to identify the originators cannot avail themselves of the new statutory defences. It remains to be seen how those provisions operate.

Liability of providers of internet search engines

39. I turn next to deal with my second topic which concerns liability for defamatory content generated by the use of internet search engines.
40. I have so far been discussing the difference between primary and secondary publishers. A third category involves entities sometimes referred to as “mere conduits” or “passive facilitators”. These include entities like the Post Office and operators of telephone networks. Although their services may be used to publish libels, they are not themselves regarded as publishers at common law and often have statutory immunity. They provide the means for one person to communicate with another but play no active role regarding the content of those exchanges.
41. Internet Service Providers – or “ISPs” – have been held to fall within that category. In *Bunt v Tilley*,²⁵ a decision of the English High Court which has been widely accepted,²⁶ Eady J struck out an action brought by a plaintiff against three ISPs whose only role was to afford the persons posting the defamatory matter a connection to the internet.

²⁵ [2007] 1 WLR 1243.

²⁶ For instance in *Crookes v Newton* [2011] 3 SCR 269; *Davison v Habeeb* [2011] EWHC 3031; *Tamiz v Google Inc* [2013] 1 WLR 2151; *Wishart v Murray* [2013] NZHC 540; and *Oriental Press Group v Fevaworks* FACV No 15/2012 (4 July 2013).

42. Issues have arisen as to whether the provider of an internet search engine such as Google or Yahoo should also be classed as a mere conduit or whether it should instead be deemed a publisher at common law potentially liable for defamation.
43. The internet is of course a global network of computers comprising tens of billions of web pages and search engines are an essential means for locating content on the World Wide Web. In *Metropolitan International Schools v Designtecnica*,²⁷ Eady J explained how a search engine operates in the following terms:

“What happens is that Google compiles an index of pages from the web and it is this index which is examined during the search process. ... [The] index is compiled and updated purely automatically (ie with no human input). The process is generally referred to as ‘crawling’ or the ‘web crawl’.

When a search is carried out, it will yield a list of pages which are determined (automatically) as being relevant to the query. The technology ranks the pages in order of ‘perceived’ relevance – again without human intervention.”

44. Search results take the form of hyperlinks to web pages. To make the search process more user-friendly, there is usually displayed alongside some indication of the contents of the linked website. This might be a text excerpt, an image or a snapshot of the site. These previews are often called “snippets”. The initial series of cases brought against search engine providers have concerned “snippets” said to be defamatory.

²⁷ *Metropolitan International Schools Ltd v Designtecnica Corpn* [2011] 1 WLR 1743 at §§11-12.

45. *O’Kroley v Fastcase Inc*²⁸ in the United States District Court in Tennessee provides a good illustration. Mr Colin O’Kroley decided to do what is sometimes called a “vanity search” on Google. In other words, he performed a search for his own name and, to his horror, the snippet which the search produced showed “his name in a sentence fragment separated by an ellipsis from another sentence fragment including the words ‘indecent with a child’”. He sued Google on the ground that the snippet wrongfully suggested that he had been accused or convicted of that crime.
46. The snippet was probably defamatory, but the linked web page was not. If one clicked on the hyperlink, one would have seen from the web page that Mr O’Kroley’s name appeared at the start of an innocuous entry in a digest of legal cases, but the Google excerpt had also captured the words at the tail-end of the preceding entry which referred to a child indecency case. The Court dismissed Mr O’Kroley’s action on the basis of Google’s immunity under section 230 of the Communications Decency Act 1996 which I have already mentioned.
47. Where no such immunity exists, is the search engine provider liable for publishing the defamatory snippet? Is the position different after it receives a complaint and becomes aware of the offending search result?
48. The case-law (outside the United States) is at present far from definitive. However, some divergence has emerged between Eady J’s decision in 2011 in the *Metropolitan International Schools* case and the decision of Beach J in 2012 in the Supreme Court of Victoria in *Trkulja v Google (No 5)*.²⁹

²⁸ 2014 WL 2197029 (M D Tenn).

²⁹ [2012] VSC 533.

49. The *Metropolitan* case was one in which the plaintiff sued Google, alleging that both the snippet and the linked website were defamatory, in suggesting that it was involved in a “scam”. Eady J was not sympathetic. His Lordship noted that Google does not choose the search terms which the user inputs and stressed the absence of human intervention in producing the search result. He decided that Google was not a publisher at common law because, in his view, it had not authorised or caused the snippet to appear on the user’s screen in any meaningful sense. He held in effect that by providing the search engine, Google had acted as a mere conduit or facilitator akin to an ISP.³⁰ That remained the case, in his Lordship’s view, even after receiving complaints about defamatory snippets and content.
50. Eady J emphasised the technical difficulties involved since, unlike a website host, a search engine provider cannot simply press a button to ensure that the offending words will never reappear in a search snippet. Whatever the search engine provider might do, the offending website would remain in existence. And if the author of the defamation should post the same matter on other websites, the search engine might well find them and create similar snippets. Against that background, Eady J held that it would be unrealistic to attribute responsibility for publication to Google, whether on the basis of authorship or acquiescence.³¹
51. In *Trkulja v Google (No 5)*, Beach J declined to follow *Metropolitan*. That was also a case which involved snippets (this time in the form of photo images) and linked web page content both said to be defamatory. His Honour took the view that while internet search engines operate in an

³⁰ *Metropolitan* at §§50-51.

³¹ At §64.

automated fashion, they “operate precisely as intended by those who own them and who provide their services.”³² He added: “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.”

52. Beach J’s view is, however, not the last word on the topic in Australia. In the Federal Court, in *Rana v Google Australia*,³³ a case decided in 2013, Mansfield J reviewed the authorities, including Beach J’s judgment, and held that whether or not a search engine can be considered a publisher of defamatory material “is not settled in Australia”.
53. Which is the preferable approach? The approach of Eady J or Beach J? In my view, there is merit in both positions, but I think it important to distinguish between liability for a defamatory snippet on the one hand and liability for providing a link to a third party’s defamatory website on the other.
54. To take snippets first, Eady J likened a search engine provider to a passive facilitator of a communications network. But the analogy is not very convincing since, unlike mere conduits or passive facilitators, a search engine provider *does* deal with content, crawling and indexing websites and generating snippets which point the way to websites of interest by reference to their content. Indeed, in a case like *O’Krole v Fastcase Inc*, the underlying web pages are inoffensive and it is only because of the way the search snippet is displayed that the plaintiff’s

³² *Trkulja v Google (No 5)* [2012] VSC 533 at §27.

³³ *Rana v Google Australia Pty Ltd* [2013] FCA 60 at §58.

reputation is injured. The publisher of such injurious content can only be the search engine provider.

55. At the same time, with respect, I think that Beach J overstates the case by suggesting that the search engine provider's intentional use of pre-programmed algorithms should be equated with an intention to publish the defamatory content in a snippet. If that approach were taken, the provider would be deemed a primary publisher and attract strict liability, which would plainly be unwarranted.
56. Beach J in fact appears to suggest that search engine providers should be treated as secondary rather than primary publishers. I would tentatively be inclined to agree with that classification in relation to snippets. Secondary publishers do not actually know and do not intend to publish the defamatory matter. They avoid liability if, relying on the innocent dissemination defence, they can show that, without negligence on their part, they did not know of the defamatory matter disseminated and, on becoming aware of it, took steps to excise the defamatory result as soon as reasonably practicable.
57. Eady J's approach is more apposite for dealing with cases where the snippet itself is not defamatory but where the search provides a hyperlink to a website which *is* defamatory of the plaintiff. In such cases, the search engine does not create any autonomous offensive content but functions merely as a location tool. It indicates where already existing content, made available by third parties on the internet, can be found. In that situation, the analogy with a mere conduit or passive facilitator is far more compelling. Until recently, I think one would confidently have rejected any suggestion that the search engine provider is liable in that situation. Authority in support could be found in the decision of the

Canadian Supreme Court in *Crookes v Newton*,³⁴ where Abella J, held that a defendant who embedded a hyperlink in his article, linking it to another article containing defamatory matter, did not thereby publish the defamation contained in the second article.

58. I said “until recently” because the debate could be opened up by the recent decision of the Grand Chamber of the European Court of Justice involving Google, Spain.³⁵ It is a decision which has stirred up much controversy by asserting that “a right to be forgotten” exists by virtue of a European data protection law. It is not a libel case but plainly has implications that may be relevant.
59. The problem started once again with a “vanity search”. In November 2009, Mr Mario Costeja González made a Google search for his own name and this produced links to the electronic version of a newspaper, displaying two pages which had originally been published more than 10 years earlier. Those pages advertised an auction of property owned by Mr González which had been attached as part of proceedings against him for recovery of social security debts. He was agitated by the search results because those proceedings had long been resolved and he regarded the information about them as entirely irrelevant (and no doubt embarrassing). It was not a case of libel since there was nothing false or inaccurate about the fact that his property had been attached and advertised. In fact, the advertisements had been placed by the lawful order of the Ministry of Labour and Social Affairs. That was why his claim against the newspaper to take down those web pages failed.

³⁴ [2011] 3 SCR 269.

³⁵ *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* 13 May 2014, Case C-131/12.

60. However, with the support of the Spanish Data Protection Agency, Mr Gonz ález persuaded the European Court of Justice (acting contrary to the opinion of its Advocate General³⁶) to make the search engine provider liable. The ECJ declared that a user like Mr Gonz ález had the right to demand that Google should remove from search results relating to his name, links to a third party's web pages containing information regarding him which is "inadequate, irrelevant or excessive in relation to the purposes of the [data] processing [concerned]".³⁷ The Court did, however, acknowledge that this "right to be forgotten" could be overridden in cases where "the preponderant interest of the general public" supported retention of the relevant information in the search results.³⁸
61. Mr Gonz ález was not complaining about Google publishing a defamatory snippet or other defamatory content about him. The search engine was, in this case, merely functioning as a location tool. The information objected to was in the website located. Nevertheless, the ECJ upheld Mr Gonz ález's right to be forgotten against Google (subject to a public interest exception) even though the publication was perfectly accurate and lawful. Given such a result, it would not be surprising to hear it argued that the courts should be all the more willing to adopt the same approach where the located website contains defamatory matter. We shall have to wait and see whether such claims materialise.
62. The *Google, Spain* case may have other implications arising out of Google's reaction to the judgment rather than the judgment itself. I have

³⁶ Advocate General Jääskinen, Case C 131/12 (25 June 2013).

³⁷ Judgment at §92.

³⁸ Judgment at §§81, 97 and 99.

touched on the difficulties faced by an intermediary trying to decide whether a take down request alleging defamation is justified. Such difficulties are at least as great in relation to the right to be forgotten: How is the search engine provider to know whether the search result is inadequate, irrelevant or excessive? How does it judge whether it is in the public interest that the information should remain available? Additionally, search engine providers face the technical difficulties involved in trying to devise an effective means of blocking objectionable search results. But given Google's reaction, the courts might be less deterred by such practical problems from imposing liability.

63. Google has indicated that it is exploring ways of complying with the ECJ judgment and that it intends "to assess each individual request and balance the rights of the individual to control his or her personal data with public's right to know and distribute information".³⁹ This is so even though The Financial Times reported on 3 June 2014 that in the first four days, Google received more than 41,000 removal requests.⁴⁰ By 4 July, it was reported that more than 70,000 removal requests involving over 250,000 links had been received, with requests continuing to be made at the rate of around 1,000 per day.⁴¹ Google's willingness to undertake such a demanding task may encourage some courts to discount the technical and practical problems and be more prepared to impose liability.
64. I hasten to add that I am not by any means encouraging actions against search engine providers when they are acting merely as location tools. I

³⁹ <http://www.google.fr/policies/faq/>.

⁴⁰ Of these reportedly, 31% concerned frauds or scams; 20% concerning arrests or convictions for violent or serious crimes; and 12% concerning arrests for child pornography.

⁴¹ Rhiannon Williams, <http://www.telegraph.co.uk/technology/google/> (4 July 2014).

mention *Google, Spain* only because search engine liability has already engendered divergent views and the ECJ decision may well contribute to the evolving picture.

Concluding remarks

65. Let me turn to my concluding remarks. At the beginning of this address I spoke of defamation law seeking a balance between the right to reputation and the right to free expression. In internet cases, that balance must accommodate a far more complex constellation of rights, freedoms and policies. The courts are not simply concerned with the originator's defamation and the victim's injured reputation. They must assess the liability of all kinds of internet intermediaries who are in some way involved in the publication of defamatory statements by third persons. The courts must be careful not to cause collateral damage to the general right to free expression and information. They must not impose liabilities which threaten the viability of entities which provide facilities essential for using the internet. The courts' defamation decisions may have implications not only for free expression and rights to reputation, but also for privacy and data protection rights, as well as rights to protection of electronic commerce, in countries where such protection exists.
66. The internet has other dimensions raising legal problems which I have not had time to explore. These include problems arising out of its global and borderless reach and the enduring nature of matter circulating in cyberspace. For example, conflicting rules exist in different jurisdictions as to whether repeated publications of the same defamatory statement each constitute a fresh cause of action, or whether the single publication rule should apply. The choice of rule has implications for limitation periods and possibly on the multiplicity of actions. Remedies and

enforcement may obviously pose problems where relevant parties are abroad, especially if in jurisdictions offering statutory immunity.

67. In an ideal world, one might hope to see a series of carefully calibrated statutes sensitively addressing each of those complex concerns and providing a coordinated and balanced policy. But of course, life is seldom ideal and one cannot necessarily count on the legislature. In the absence of applicable statutes, the courts have had to fall back on the common law. It may seem odd that they have had recourse to centuries-old cases and have considered the possible value as precedents, of such matters as graffiti on lavatory walls and versified notices pinned onto golf club notice boards. But it is a hallmark of the common law that the courts seek to adapt established principles to solve novel problems. The cause of action asserted by the plaintiff is itself a creature of the common law and invites a common law response.
68. Convergence or divergence in the courts' decisions in this area has depended on which principles were selected, on whether the principles were extended and on how they were actually applied. By and large, there has been convergence in adopting the standard of reasonableness and in accepting notice and take down policies by intermediaries as prima facie reasonable. But, as I have stated, that is not an ideal solution and limited statutory immunities such as those conferred by the UK's Defamation Act 2013, restricting actions against intermediaries to cases where the originator of the libel cannot be identified, are attractive. Such a scheme can obviously only be introduced by legislation. The common law has shown itself resourceful, but the limits of judicial intervention and the need for supportive legislation in this area must be recognized.