

Protecting Google from defamation is worth seriously considering

Written by Michael Douglas, Senior Lecturer in Law, University of Western Australia

It has been a *huge* week for defamation law.

Last Thursday, the NSW Government announced a push to reform Australia's uniform defamation laws. It is calling for a "[cyber-age reboot](#)". That proposal was backed by a [statutory review of the NSW Defamation Act](#). At a meeting of the Council of Attorneys-General, the states and territories agreed to reconvene a working party to consider [reform](#) of equivalent statutes around Australia.

The following Wednesday, the High Court delivered its [most important defamation judgment in years](#). In a case that fits perfectly with the theme of the NSW proposals, Milorad "Michael" Trkulja succeeded in his [appeal against Google](#). The Court found that Trkulja could sue the American company for defamation in respect of search results which [potentially indicated that he had ties to Melbourne's criminal underworld](#).

[The next morning](#), the Victoria Court of Appeal allowed Bauer Media's appeal from the judgment that [awarded Rebel Wilson A\\$4.5 million in damages](#). The Court held that Wilson was entitled to A\$600,000, and not to millions extra for lost opportunity to earn from roles that she may have been offered had the defendant not defamed her in its gossip magazines. The previous assessment of damages depended on the spread of the defamatory allegations on the internet via the "[grapevine effect](#)".

The record for Australia's largest defamation judgment is now barrister Lloyd Rayney's [A\\$2.6 million defamation win against the State of Western Australia](#), litigated by Perth firm Bennett + Co. If Rayney's current appeal is successful, [that figure may increase even further](#).

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There's a lot to think about.

The NSW proposal to allow large corporations to sue for defamation is [particularly worrying](#). It would have a significant [chilling effect on journalism](#).

But the issue that the NSW government chose to highlight from its statutory review was that defamation law is ill-equipped for the digital era. I agree that the way we communicate has [completely changed in the 13 years since our Uniform Defamation Acts were introduced](#).

Read more: [***Defamation in the digital age has morphed into litigation between private individuals***](#)

***Trkulja v Google* shows it is time for reform**

[Trkulja was shot in the back](#) in a Melbourne restaurant in 2004. As you'd expect, people wrote about it on the internet. Google provided access to that content through its search engine: web crawlers discovered web pages relevant to Trkulja, indexed them, and ranked them via its [Google Search algorithms](#).

The result of those processes was that Trkulja was associated with some shady figures through Google search. A Google image search for his name would display Trkulja's picture with [those of Melbourne criminals](#). The results pages contained keywords like "melbourne criminals" and "melbourne underworld photos".

Google's autocomplete results would also [cast him in a poor light](#), returning terms like "michael

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Trkulja criminal” or “michael trkulja underworld”. The results page linked to content which described Trkulja as a “former hitman”.

Trkulja sued, claiming that this computer-generated material defamed him. Google argued that the claim was so weak that it should come to an end even before a trial. Victoria’s Supreme Court [rejected Google’s argument](#) .

Read more: [Craig McLachlan, defamation and getting the balance right when sexual harassment goes to court](#)

But the Victorian Court of Appeal [allowed Google’s appeal](#) , agreeing that the claim had no prospect of success. It found that the [ordinary, reasonable person](#) would not understand that the search results conveyed “imputations” which damaged Trkulja’s reputation. In their view, ordinary people would understand that there may be a disconnect between the words you type into Google and the results that follow.

On further appeal, the High Court unanimously decided that the Court of Appeal was wrong. At least some of the search results complained of [had the capacity](#) to convey the idea that Trkulja was associated with dodgy characters. Trkulja was given “[the green light to sue](#)” Google. Trkulja’s claim can now proceed.

Even before this case, you could sue Google for defamation

Like other foreign companies, Google is not immune to litigation [because it is based overseas](#) . On old principles, Google can be responsible for third party content which it [“published” by sharing](#) . It might have a defence of “[innocent dissemination](#)”, but perhaps not if the defamed person [drew the problem to the company’s attention](#)

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People have won against Google before. A few years ago, [Janice Duffy succeeded](#) in her claim that Google should be responsible for linking to defamatory websites. So in a sense, yesterday's judgment is nothing really new.

It does provide some clarity on whether something like search results has the "capacity" to convey defamatory meaning. [It is likely that Google will continue to be sued](#) by all sorts of people who are aggrieved by search results that cast them in a poor light.

The case also demonstrates that our old laws are perhaps ill-suited to the digital era.

We should stop shooting the messenger

Reflecting on this case, it is worth considering whether we should cut [internet intermediaries](#) some slack when it comes to defamation law.

We could do so by giving effect to the "safe harbour" proposal flagged in the NSW statutory review. It would provide internet intermediaries [with a shield from liability for third parties content](#). [Telcos already enjoy](#) something like this in Australia, which protects them from liability for copyright infringement.

Faced with cases like *Trkulja*, you would understand if Google simply acceded to every request to remove content from its search results. But what if Google did that for [complaints by paedophiles](#), murderers [or dictators](#)?

Read more: [***Before you write that scathing online review, beware of defamation***](#)

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Google provides a free public service which is indispensable to our way of life. Without Google's assistance, many of us would be lost online. When access to the functionality of Google and other intermediaries is limited, [our substantive access to information is limited](#).

Extending safe harbour to internet platforms is worth seriously considering – other countries, [like the United States](#), are already doing this.

The NSW statutory review does not go into these difficult issues in enough depth. In light of the rapid developments in media and technology, [the best way forward is for the Australian Law Reform Commission to consider this in detail](#). We need to make sure that we get the right balance between freedom of speech, free access to information, and protection of reputation.

Michael Douglas is a Consultant at Bennett + Co, a litigation firm acting for Lloyd Rayney in his appeal. He is a member of the ALP and the Communications and Media Law Association, and editor of the Media and Arts Law Review.

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