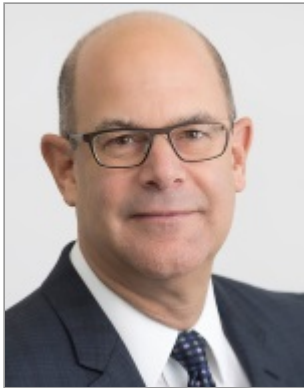


Business**For Google liability, it's all about the snippet**By **Howard Winkler**

Howard Winkler

(September 2, 2022, 2:54 PM EDT) -- Google has prevailed in Australia's highest court and avoided liability for facilitating the publication of defamatory content created by others, even once given notice of the defamatory nature of the content. For Canadian lawyers and courts, what is particularly interesting is that large portions of this well-reasoned judgment rely on a 2011 decision of the Supreme Court of Canada.

In *Google LLC v. Defteros* [2022] HCA 27, Australia's highest court set aside a ruling that found Google should be considered a publisher if it links to defamatory material after being put on notice of the defamatory nature of the content. The case involved a Melbourne-based criminal lawyer who "acted for persons who became well-known during Melbourne's 'Gangland Wars.'" The article suggested that George Defteros had crossed the line from being a professional lawyer to becoming a confidant and friend of criminal elements.

The lawyer successfully sued Google after the search engine refused to take down a hyperlink to the specific article.

To explain why the search engine should not be held liable for linking to that article, the Australian court drew heavily on the reasons for the 2011 Supreme Court of Court decision in *Crookes v. Newton* 2011 SCC 47, delivered by Justice Rosalie Silberman Abella.

"As observed in *Crookes v. Newton*, a hyperlink is content-neutral," the Australian judgment reads. "A search result is fundamentally a reference to something, somewhere else. Facilitating a person's access to the contents of another's webpage is not participating in the bilateral process of communicating its contents to that person."

The Australian court repeatedly returns to *Crookes v. Newton*, noting, "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."

This is a significant common law defamation decision. It clearly establishes that search engines such as Google are not *prima facie* a publisher for the purposes of defamation simply because they facilitate access to the content of others.

Yet this is not an absolute win for Google. That is because the court leaves open the possibility that the snippet of content — made up of 20 or so words — that Google automatically generates in search results, could itself be defamatory. A snippet that is itself defamatory or incorporates, adopts or endorses the content linked to may give rise to liability. Further, a snippet that invites or encourages comment might also give rise to liability.

That latter situation is more of an issue for platforms such as Facebook or Google reviews, rather than Google search results *per se*.

The judgment is also important in that it manages to reconcile all the previous legal decisions in Australia involving Google and Facebook that involve claims of defamation, on issues not yet

considered by Canadian courts. Because the decision is so well reasoned and relies so heavily on the ruling of the Supreme Court of Canada, it is likely Canadian courts will find this decision persuasive when considering these other issues.

No matter how you look at it this was a significant victory for Google and shows, as the Australian judgment notes, "Facilitating a person's access to the contents of another's webpage is not participating in the bilateral process of communicating its contents to that person."

But Google isn't out of the woods yet. The door has been left open for liability arising from the automated snippets created by Google and more importantly in respect of Google Reviews, in which comments are encouraged and invited by the platform.

Howard Winkler is the founder and principal of Winkler Law. For more than 35 years, his areas of practice have included media law, libel and slander and reputation management.

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