CAITLIN ASHBY

CAN A SEARCH ENGINE… [BE HELD LIABLE FOR DEFAMATION]?

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Table of Contents

Abstract

When defamed online, it has become increasingly common for complainants to seek compensation from the internet intermediaries (such as internet service providers, search engine providers and website hosts) which conceivably bear some responsibility for those publications. The liability of search engine providers is particularly contentious. This is because the defamatory words which appear in autocomplete suggestions and snippets are unique publications made by the search engine, but without the direct knowledge or approval of any human actor. The only case in New Zealand to have addressed this issue, A v Google, *suggests that search engines might be liable as publishers, but is ultimately inconclusive. This paper seeks to clarify the extent to which providers of search engines should be held liable in New Zealand for the defamatory content they disseminate by comparing the liability doctrines which have been applied overseas and assessing the policy implications of each approach. Ultimately, the author concludes that it would be disingenuous to preclude liability on the basis that a search engine is a mere facilitator of the defamatory content it disseminates. Instead, this paper argues that liability should arise only once the search engine provider has actual knowledge of the defamatory words and has failed to remove them within a reasonable time, so as to support an inference that the search engine provider has assumed some responsibility for the publication. The assumption of liability doctrine is preferred as it provides an avenue for victims to seek compensation from those at fault, without encroaching on freedom of expression beyond what is reasonably necessary.*

Word count

The text of this paper (excluding abstract, table of contents, non-substantive footnotes and bibliography) comprises approximately 7,997 words.

Key terms

"Defamation", "Publication", "Search engine", "Google".

I Introduction

Imagine that you have applied for a job, for which you are highly qualified. The hiring manager is duly impressed by your CV, but she must exercise due diligence before taking things further. She decides to conduct a quick Google search of your name. Upon typing your name into the search bar, the hiring manager sees that autocomplete suggests "[your name] is a stalker" as a potential search term.[1] She also finds several webpages listed on the Google results page which seem to refer to you. She doesn't follow the links, but does read the surrounding snippets, which describe you as a furtive stalker and a dangerous person.[2] This discovery leaves the hiring manager uneasy, and she decides not invite you for an interview. A few weeks later, a friend brings to your attention the snippets and autocomplete suggestion which portray you as a dangerous stalker. You are shocked by the false allegations and suspect they may have influenced the hiring manager's decision not to call you back for an interview. To resolve the issue as soon as possible, you ask Google to block the snippets, and to remove the "stalker" suggestion from autocomplete. Despite your efforts, several days pass, and Google fails to take any action. Would you expect to succeed in a defamation action against the search engine provider?

The multifaceted nature of internet publication has made it increasingly attractive for complainants to seek compensation from the deep pockets of internet intermediaries such as internet service providers (ISPs), search engine providers ("search engines"), and website hosts; [3] which, it is argued, are liable by virtue of facilitating, hosting or approving of defamatory content. Search engine liability is particularly contentious – no clear global trend has emerged - as the defamatory materials which appear in autocomplete suggestions and snippets are unique publications of transient data, but made without the direct knowledge or approval of any human actor.[4] Whether a search engine can be said to be legally responsible for the publication of such material is unsettled,

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[1] Autocomplete is a function which suggests common queries based on the words a user has entered.
[2] A snippet is "a small excerpt from [a] web page that demonstrates the pages relevance to the search terms." *A v Google New Zealand Ltd* [2012] NZHC 2352 at [24].
[3] Susan Corbett "Search Engines and the Automated Process: Is a Search Engine Provider "a Publisher" of Defamatory Material?" (2014) 20(3) NZBLQ 200 at 207; and Ryan Turner "Internet defamation law and publication by omission: a multi-jurisdictional analysis" (2014) 37(1) UNSWLJ 34 at 61.
[4] Stavroula Karapapa and Maurizio Borghi "Search engine liability for autocomplete suggestions: personality, privacy and the power of the algorithm" (2015) 23 Int J Law Inf Technol 261 at 263.

although trends in Australia suggest that the issue is likely to arise here soon.[5] This paper seeks to clarify the extent to which providers of search engines should be held liable in New Zealand for the defamatory content they disseminate.

Part II of this paper will assess New Zealand's current position on search engine liability. This part will consider New Zealand's only authority on defamation by a search engine, *A v Google*,[6] as well as the country's most authoritative internet intermediary liability case, *Murray v Wishart*.[7] While these judgments indicate that liability based on a positive assumption of responsibility for the defamatory content might be the most consistent approach, they are ultimately inconclusive.

In Part III, this paper will compare three ways that common law defamation liability for search engines could be conceptualised. English precedent avers that search engines are 'mere facilitators' and not prima facie publishers of defamation. In contrast, the courts in Australia and Hong Kong have imposed liability on search engines as secondary publishers, subject to the innocent dissemination defence. Finally, in Canada and New Zealand, the courts have found that certain internet intermediaries are liable only once they are aware of the defamatory material and fail to exercise their ability to remove it in a reasonable time, so as to give rise to an inference that they have assumed responsibility for it. [8] However, this assumption of responsibility doctrine has yet to be applied to search engines.

This paper analyses the policy arguments related to the imposition of liability on search engines in Part IV. This section will interrogate the risks of total immunity, such as the absence of remedies for wronged parties, and the lack of incentives to respond to valid

[5] See Michaela Whitbourne "The Australian woman who took on Google twice – and won both times" *The Sydney Morning Herald* (online ed, Sydney, 5 Feb 2023); and "Google wins defamation battle as Australia's high court finds tech giant not a publisher" *The Guardian* (online ed, Sydney, 17 Aug 2022).
[6] *A v Google*, above n 2.
[7] *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722.
[8] In the literature, this is often referred to as the 'publication by omission' doctrine. See, for example, Turner, above n 3. The author finds that this label fails to acknowledge that it is not the omission to remove the content which gives rise to liability, but the assumption of responsibility often implied by that omission. Accordingly, this approach will be referred to throughout this paper as the 'assumption of responsibility' doctrine.

takedown notices. Attention will also be paid to the impact liability would have on free speech, taking into account the extent of the reputational harms suffered by complainants.

In Part V, it will be argued that the assumption of responsibility doctrine provides the best approach to search engine liability, and should be adopted in New Zealand. By constructing liability based on an inference of acquiescence or endorsement of the defamatory material, complainants would be provided with a mechanism to vindicate their reputational rights against those who are legitimately at fault. In addition, because such an inference requires search engines to have actual knowledge of the defamatory nature of the words, this doctrine is best placed to prevent unreasonable intrusions on free speech and public debate.

II Current State of the Law

In New Zealand, search engine liability for defamation is a novel point of law. The first and only case to have considered the issue is *A v Google*, heard by the Auckland High Court in 2012. The case concerned snippets which were alleged to have defamed the claimant, a medical practitioner referred to as 'A'. A had appealed to Google NZ to take down the content. Google NZ forwarded the request to Google LLC. While Google LLC removed access to the initial URLs, the search engine failed to prevent republication of the snippets. Ultimately, A's claim failed on the basis that he had brought the action against the wrong claimant. Google NZ, it was found, provided sales and marketing support to Google LLC's New Zealand customers, and did not have any editorial control over the search results.[9]

Proceeding in the alternative, Abbott AsJ considered Google's status as a publisher, and opined that it was "reasonably arguable that a search engine is a publisher" in respect of defamatory snippets.[10] The exact meaning of this dictum is unclear. While it could be read as cautious approval of prima facie liability, the statement was made in the context of casting doubt on the argument that search engines were passive entities incapable of attracting liability. The judgement also appears to conflate the secondary publisher

[9] *A v Google*, above n 2, at [26] and [46].
[10] *A v Google*, above n 2, at [71].

doctrine and the assumption of responsibility doctrine.[11] As this paper will discuss, the approaches are distinct.

New Zealand's most authoritative internet intermediary case, *Murray v Wishart,* may provide further clarification. The Court of Appeal in *Murray* held that the host of a private Facebook page would only be liable for defamatory comments left on that page if the host had actual knowledge of those comments, and neglected to act on that knowledge so as to give rise to an inference that the host had taken responsibility for the comments.[12] In their judgement, O'Regan P, Ellen France and French JJ found that a constructive liability standard would not be desirable. Their Honours were concerned that imposing liability prior to actual knowledge would be contrary to the nature of defamation as an 'intentional' tort, and could unduly limit freedom of expression.[13] This paper will consider how these concerns apply to search engines in Part V.

While these cases suggest that liability based on an assumption of responsibility might be the most appropriate solution, there has been no authoritative determination on the matter. The benefits and disbenefits of the existing liability doctrines must be examined in order to determine the best approach.

III Liability at Common Law

The elements of the defamation tort remain broadly the same whether publication occurs online or in the physical world.[14] To bring a successful defamation claim, the plaintiff must prove that: [15]

(1) a statement has been made which bears defamatory meaning;
(2) the statement was about the plaintiff; and
(3) the statement has been published by the defendant.

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[11] At [62].
[12] *Murray v Wishart*, above n 7, at [170].
[13] At [140]-[141].
[14] David Harvey *Internet.law.nz: Selected Issues* (4th ed, LexisNexis NZ Ltd, Wellington, 2016) at [5.5]. In *O'Brien v Brown*, Aotearoa's first web defamation case, Ross J did not accept that the "culture of the internet" gives rise to any greater freedom to comment than would be acceptable by any other means of publication. *O'Brien v Brown* [2001] DCR 1065 at [34].
[15] *A-Z of New Zealand Law* (2023, online ed) Defamation at 59.15.2.

Historically, publication has been the most straightforward element of the tort.[16] In online defamation cases, however, publication has become a core issue.[17] This section explores three potential approaches to the issue of search engines as publishers of defamation: immunity as a passive instrument, liability as a secondary publisher, and liability by way of assumed responsibility.

A "Mere Facilitators"

A series of judgments have narrowed the scope of internet intermediary liability on the basis that certain types of intermediary are not sufficiently involved in the dissemination of online content for the publication element to be made out.[18] This narrow interpretation of 'publication' has been most commonly applied to exclude ISPs from liability, but it has also been considered in relation to search engines. It is arguable that the passive instrument doctrine could protect search engines from defamation liability for snippets and autocomplete suggestions in New Zealand.

1 The "Passive" Role of ISPs

The first and most significant case to hold that certain internet intermediaries are mere facilitators was *Bunt v Tilley*, an ISP case heard in England. [19] The claimant, Bunt, argued that certain ISPs should be liable for enabling the individuals who defamed him to access the message boards where they posted the imputations. The Court, however, found that none of the ISPs were liable. To impose liability for a defamatory publication, Eady J argued, it was essential to demonstrate some degree of awareness or assumption of responsibility on the part of the intermediary.[20] Unlike in *Godfrey v Demon Internet*, the ISPs in *Bunt* had no "knowing involvement in the publication of the relevant words."[21] Furthermore, the Judge considered that there could be no liability when the internet

[16] Rosemary Tobin "Publication and Innocent Dissemination in the Law of Defamation: Adapting to the Internet Age" (2016) 27(1) NZULR 102 at 115.
[17] Tobin, above n 16, at 115.
[18] Emily B. Laidlaw and Hilary Young "Internet Intermediary Liability in Defamation" (2019) 56(1) OHLJ 112 at 121.
[19] *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1243.
[20] At [21]-[22].
[21] At [23]. The ISP in *Demon Internet* hosted the Usenet server and directly stored the defamatory postings, effectively performing the role of a content host. See *Godfrey v Demon Internet Ltd* [2001] QB 201, [2000] 3 WLR 1020.

intermediary did not play a meaningful role in the publication.[22] His Honour compared ISPs to telephone companies and postal services, which transmit communications without participating in the communication itself.[23] Overall, Eady J held that "an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law."[24]

Other jurisdictions have approved of the passive instrument doctrine. The Supreme Court of Canada in *Crookes v Newtown* treated *Bunt v Tilley* positively.[25] Justice Deschamps, delivering the third majority judgement, recommended that the decision be incorporated into the Canada common law in respect of intermediaries which play a "passive instrumental role" in defamatory publications.[26] The Hong Kong Court of First Instance considered *Bunt* in *Oriental Press Group v Fevaworks*, and although the case was distinguished on the facts, the Court accepted that a 'mere conduit' which performs a passive role in the dissemination of defamatory content does not publish and thus is not liable.[27]

2 Application to Search Engines

The subsequent ruling of Eady J in *Metropolitan International Schools v Designtechnica* extended the doctrine to encompass search engines. [28] The plaintiff, Metropolitan Schools, had alleged that Google was liable for a defamatory snippet which appeared when the name of their gamified adult distance learning course was entered into the search engine. Delivering the judgment of the Queen's Bench, Eady J followed his ruling in *Bunt v Tilley* to confirm that a mental element is necessary for an intermediary to be held responsible for a defamatory publication.[29] The Judge considered that this was not present in the circumstances because Google played no role in formulating the search

[22] *Bunt*, above n 19, at [36].
[23] At [9] and [37].
[24] At [36].
[25] *Crookes v Newton* 2011 SCC 47, [2011] 3 SCR 269 at [20]-[21].
[26] At [89].
[27] *Oriental Press Group Ltd & Others v Fevaworks Solutions Ltd & Others* [2012] 6 HKC 313 (CFI), (2012) 1 HKLRD 848 at [61]. See also *Oriental Press Group v Fevaworks* [2013] 5 HKC 253, (2013) 16 HKCFAR 366 at [54].
[28] *Metropolitan International Schools Ltd (t/a SkillsTrain and/or Train2Game) v Designtechnica Corpn (t/a Digital Trends)* [2009] EWHC 1765 (QB), [2011] 1 WLR 1743.
[29] At [49].

terms, nor in providing the snippets which were generated automatically in accordance with the search engine's programming.[30] Eady J concluded that Google Inc was merely a facilitator, and thus could not be liable for the publications.[31]

In contrast with ISPs, which are generally accepted to be passive entities, the argument that search engines are mere facilitators is contentious. On one hand, courts such as the Supreme Court of British Columba in *Niemela v Malamas* have applied the 'passive instrument test' and determined that Google is not a publisher of defamatory hyperlinks or snippets.[32] In *Google LLC v Defteros,* the High Court of Australia also found that Google was not a publisher of the defamatory content discoverable through a hyperlink which could be accessed via the search engine.[33] The majority considered that providing access to a hyperlink did not itself constitute a publication, because the search engine merely provided users with the means to navigate from one webpage to another.[34] Kiefel CJ and Gleeson J concluded that hyperlinking was analogous to referencing; the words can only be said to communicate that something exists, and not the contents of that thing.[35] However, instrumental to the High Court's finding in *Defteros* was the fact that Google LLC had not provided a forum where the defamatory words could be directly communicated.[36] This suggests that search engines might be considered passive facilitators of hyperlinks, but not in relation to the content which they communicate directly, such as snippets or autocomplete suggestions.

Recent cases in England and New Zealand have failed to extend the passive instrument doctrine to other types of content host. The English Court of Appeal in *Tamiz v Google Inc* distinguished *Bunt,* and found that Google Inc could be liable on the basis it had directly hosted the infringing content on its Blogger.com platform.[37] The New Zealand Court of Appeal in *Murray v Wishart* acknowledged *Bunt* only briefly, because the extent

[30] At [50]-[51].
[31] At [64].
[32] *Niemela v Malamas* 2015 BCSC 1024, [2015] BCJ 1250 at [107].
[33] *Google LLC v Defteros* [2022] HCA 27, (2022) 403 ALR 434 at [48]-[50], [59].
[34] At [52].
[35] At [53].
[36] At [49].
[37] *Tamiz v Google Inc* [2013] EWCA Civ 68, [2013] 1 WLR 2151 at [34].

of Murray's editorial control over the Facebook page where the defamatory comments were posted meant it was clear that he was not a passive entity.[38]

Academics have also questioned the applicability of the passive instrument doctrine to search engines. Oster argues that publication ought to be a mere factual requirement, satisfied by any act of facilitation on the part of an intermediary.[39] This is echoed by one of the dissenting judges in *Defteros*, Gordon J, who considered that Google should be liable on the basis of the strict publication rule: any person involved in the dissemination of defamatory material is prima facie liable.[40] The publication rule notwithstanding, some doubt whether the algorithms deployed by search engines are truly so neutral as to render search engines passive entities.[41] Oster, for example, is unconvinced by Eady J's assertion that a search engine plays no meaningful role in the snippets generated in response to user searches.[42] For one, the algorithms utilised by search engines have been created by human actors for a particular purpose.[43] Although they do not make editorial decisions regarding individual publications, search engine operators do exercise design control over their algorithms, including how snippets are formulated, and which results appear first.[44] Furthermore, search engines are not mere facilitators in the sense that they are able to communicate defamatory material in their own right. Despite Google's assertions that its autocomplete 'predictions' are designed to help users complete searches which they were already intending to make,[45] the fact remains that autocomplete may draw a user's attention towards search terms that they would not otherwise have contemplated.[46] Reading a defamatory autocomplete phrase might also lead users to

[38] *Murray v Wishart*, above n 7, at [88] and [116].
[39] Jan Oster "Communication, defamation and liability of intermediaries" (2015) 35(2) *Legal Studies* 348 at 356.
[40] *Google LLC v Defteros*, above n 33, at [130] and [137].
[41] Anne S Y Cheung "Defaming by Suggestion: Searching for Search Engine Liability in the Autocomplete Era" (Faculty of Law Research Paper No. 2015/018, University of Hong Kong, 2015).
[42] Oster, above n 39, at 359.
[43] *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 at [18] per Beach J; and *Google LLC v Defteros*, above n 35, at [129] per Gordon J (dissenting).
[44] Gary K Y Chan "Search engines and Internet defamation: Of publication and legal responsibility" (2019) 35(3) CLSR 330 at 333.
[45] Danny Sullivan "How Google autocomplete works in Search" (20 April 2018) The Keyword <www.blog.google>.
[46] Karapapa and Borghi, above n 4, at 264.

presume that there are multiple sources which support that claim.[47] The fact that government officials have a history of lobbying search engines to exclude certain terms from autocomplete suggestions, Karapapa and Borghi argue, indicates a perception that autocomplete recommendations can alter user behaviour.[48]

B Publishers

If search engine providers aren't precluded from liability as mere facilitators, they might be liable as publishers of the content produced by their algorithms. Primary publishers of defamatory content are those that "know of the specific communication and have the ability to prevent its publication."[49] This will not be satisfied by search engines, which lack the practical ability or the opportunity to pre-empt publications on an individual level.[50] Secondary publishers are intermediaries which are involved in the dissemination of the content, but do not have specific knowledge or control over the words complained of prior to publication.[51] Only secondary publishers can rely upon the innocent dissemination defence.[52] Examples of secondary publishers include newspaper vendors, and the proprietors of bookstores and libraries.[53] If search engines were to be liable as publishers, it is agreed that they would fall into the secondary publisher category.[54]

It is generally accepted that there is a physical and a mental component to the secondary publisher doctrine. [55] The physical component is that the intermediary must have contributed to the publication of the material.[56] This will be satisfied by search engines for the same reasons that the mere facilitator doctrine ought to fail. The nature of the mental element is disputed. In Australia, secondary publication is a matter of constructive

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[47] András Koltay "Defamation on the internet: the role and responsibility of gatekeepers" in András Koltay and Paul Wragg (eds) *Comparative Privacy and Defamation* (Edward Elgar Publishing Ltd, Cheltenham, 2020) 290 at 300.
[48] Karapapa and Borghi, above n 4, at 265.
[49] Tobin, above n 16, at 108.
[50] Mohammud Jaamae Hafeez-Baig and Jordan English "The Liability of Search Engine Operators in Defamation: Issues Relating to Publication and Qualified Privilege" (2017) 24(3) TLJ 218 at 230-231.
[51] Chan, above n 44, at 339; see also *Thompson v Australian Capital Television Pty Ltd and others* [1996] 141 ALR 1 at 16 per Gaudron J.
[52] David Rolph "The Concept of Publication in Defamation Law" (2021) 27(1) TLJ 1 at 14-15.
[53] See *Emmens v Pottle* [1885] 16 QBD 354; and *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170.
[54] Chan, above n 44, at 339-340.
[55] Laidlaw and Young, above n 18, at 118; Chan, above n 44, at 331; and Oster, above n 39, at 357.
[56] Chan, above n 44, at 335.

liability.[57] While earlier cases have held that an intention to contribute to the publication is necessary to find liability, the courts have since clarified that it will be sufficient if the act of assistance was voluntary. In Hong Kong, publication appears to be strict liability. In certain circumstances, innocent dissemination may provide a defence to liability, as discussed below.[58]

1 Intention, Voluntariness and Strict Liability

In Australia, *Webb v Bloch* is frequently cited as the authority for the proposition that any person who intentionally contributes to the publication of defamatory material is a publisher.[59] To apply this principle, the Australian courts have had to determine whether a search engine can be said to 'intentionally' publish snippets and autocomplete predictions, so as to reach the threshold for publication. On this issue, in *Trkulja v Google (No 5)*, Beach J found the comparison between search engines and established secondary publishers to be compelling. [60] A newsagent intends to sell newspapers, although she may not know of a defamatory article contained within. Likewise, a search engine is designed by human actors who intend to publish the content generated in response to user queries, even if they don't know of the specific words. With this in mind, Beach J held that it was open for the jury to find that Google intended to publish the defamatory content, even without specific knowledge.[61]

This broad interpretation of intention was followed in subsequent Australian decisions. In 2015, Janice Duffy argued in the Supreme Court of South Australia that Google was liable for publishing defamatory autocomplete results and snippets which implied that she habitually stalked psychics. Blue J found that Google was a publisher because it had intended to publish the search results and "played a critical role in communicating the

[57] David Rolph has argued that the direction of the courts on this matter is incorrect, and that publication is strict liability; Rolph, above n 53, at 10-11; and David Rolph "Liability of internet intermediaries for defamation: beyond publication and innocent dissemination" in András Koltay and Paul Wragg (eds) *Comparative Privacy and Defamation* (Edward Elgar Publishing Ltd, Cheltenham, 2020) 271 at 284-285.
[58] See Part III.B.3 – *Innocent Dissemination.*
[59] *Google LLC v Defteros*, above n 33, at [87]; *Trkulja v Google LLC* [2018] HCA 25, (2018) 356 ALR 178 at [40]; *Google Inc v Duffy* [2017] SASCFC 130 at [90].
[60] *Trkulja (No 5)*, above n 43, at [18].
[61] At [18].

material."[62] This was upheld by the Full Supreme Court a year later.[63] The High Court of Australia in *Trkulja* (2018) refused to set aside defamation proceedings on the basis it was "strongly arguable" that Google's intentional participation in the publication of snippets and image results could support a finding that it was a publisher.[64]

Intention as the mental threshold for publication was recently reconsidered by the High Court of Australia in *Fairfax Media v Voller* - a case concerning the liability of news outlets for defamatory third-party comments left on their Facebook pages.[65] The majority held that the correct interpretation of *Webb* was that any person who contributes to a defamatory publication is a publisher, so long as the act of assistance was voluntary.[66] In *Defteros*, it was implied that the voluntariness threshold also applies to search engines.[67] Ultimately, this broadening of the mental element is a conceptual shift with no practical effect. As the courts already consider intention to be implied by virtue of the fact that publication had occurred, voluntariness is just as easily inferred.

Australia is not the only jurisdiction where prima facie liability has been applied to internet intermediaries. In Hong Kong, the Court of Final Appeal in *Oriental Press* found that the respondents were publishers of the defamatory posts made on their discussion forum.[68] In his judgment, Ribeiro PJ applied a strict liability threshold.[69] The Judge considered that references to intention forming part of the publication rule were remnants of the common law stepping in to protect innocent disseminators prior to the creation of the distinct defence, and thus should not dilute the strictness of the traditional rule.[70] Although this has not been applied to search engines, the Court of First Instance in *Dr Yeung v Google Inc* granted leave for appeal on the basis there was an arguable case that Google was a publisher of a defamatory autocomplete result within the meaning delineated in *Oriental Press.*[71] Strict liability notwithstanding, the Judge considered it

[62] *Duffy v Google Inc* [2015] SASC 170, (2015) 125 SASR 437 at [204]-[205], [230] and [233].
[63] *Duffy* [2017], above n 59, at [173]-[174].
[64] *Trukulja* [2018], above n 59, at [38].
[65] *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, (2021) 273 CLR 346.
[66] At [35].
[67] *Google LLC v Defteros*, above n 33, at [20].
[68] *Oriental Press* [2013], above n 27, at [52].
[69] At [52].
[70] At [19]-[23].
[71] *Dr Yeung Sau Shing Albert v Google Inc* [2014] 5 HCA 375 (CFI), [2015] 1 HKLRD 26 at [103]-[104].

likely that Google would still satisfy the mental element of publication because it provided a platform with the intent to assist in the process of conveying the impugned words.[72]

2 Acts of Publication

There is a certain logic behind the constructive liability doctrine - if publication is conceptualised as an act, the act itself does not change when an intermediary becomes aware of infringing content.[73] Constructive liability for the publication of snippets would also be consistent with the repetition rule.[74] As a matter of principle, however, ascribing liability to search engines on the basis that they 'voluntarily' participated in the publication is artificial, and foregoing the mental requirement altogether is unjust.

The acts which constitute publication by other secondary publishers are of a different character to those of search engines.[75] The knowledge a search engine has of the content that it hosts is fundamentally limited.[76] While book stores and libraries are able to make curatorial decisions about which books to stock and how to advertise them, search engines cannot reasonably make decisions in the same way.[77] Search engines operate at such a scale that they rely on automation by necessity.[78] For example, Google uses "crawlers" to look for new and updated pages, which, so long as they meet the technical requirements and non-spam criteria, will be automatically indexed and displayed in Google searches.[79] The Google Search Index contains hundreds of billions of webpages,[80] and would lose some of its value if the search engine was more restrictive in its indexing.[81] Snippets are generated automatically by pulling text from the meta

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[72] At [103].
[73] Koltay, above n 47, at 295; and Rolph, above n 52, at 25.
[74] Chan, above n 44, at 333.
[75] Harvey, above n 14, at [5.84]; and Anthony Gray "The Liability of Search Engines and Tech Companies in Defamation Law" (2019) 27 Tort L Rev 18 at 34.
[76] Joachim Dietrich "Clarifying the meaning of 'publication' of defamatory matter in the age of the internet" (2013) 18 MALR 88 at 102-103.
[77] J V J van Hoboken "Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines" (PhD thesis, University of Amsterdam, 2012) at 179.
[78] van Hoboken, above n 77, at 196.
[79] "In-depth guide to how Google Search works" (23 Feb 2023) Google Search Central <www.developers.google.com>.
[80] "How Google Search organizes information" (2023) Google <www.google.com>.
[81] van Hoboken, above n 77, at 177.

descriptions and body text of indexed sites.[82] These snippets cannot be edited, so staff must manually remove the URLs which generate snippets that infringe Google's content policies.[83] Autocomplete operates in a similar way; predications are algorithmically generated, while only a few select words and phrases are automatically blocked.[84] To this end, search engines have far less control over their publications than traditional secondary publishers.[85]

3 Innocent Dissemination

If search engines are prima facie liable, it might be rebuttable in the form of a successful innocent dissemination defence. Innocent dissemination is a common law defence whereby a secondary publisher can escape liability if they can prove that they neither knew nor ought to have known that the material was defamatory, absent any negligence on their part.[86] This is sometimes treated as a way of disproving the publication element, though it is in fact a distinct defence.[87] The defence in New Zealand is statutory, but its elements are substantially similar.[88]

In practice, the innocent dissemination defence is narrow.[89] If the defendant knows of the specific defamatory content, the defence will fail.[90] If the defendant knows of the defamatory content generally, but has not been provided with the specific URL necessary to locate the defamatory snippet, it may still fail.[91] If the defendant has no actual knowledge – for instance, if there has been no notification - it may still be possible to establish constructive knowledge or negligence, in which case the defence will fail.[92] Chan suggests that one way search engines might demonstrate a lack of negligence would be to "remove search results based on text analysis programs which can identify

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[82] "Control your snippets in search results" (18 Aug 2023) Google Search Central <www.developers.google.com>.
[83] Google Search Central, above n 83.
[84] Sullivan, above n 45.
[85] Gray, above n 75, at 30-31; and Cheung, above n 41, at 11.
[86] Tobin, above n 16, at 111-112; and Alex Latu "Pages, posts and publication" (2022) NZLJ 222 at 223.
[87] *Fairfax Media*, above n 65, at [47]-[49], [76].
[88] Defamation Act 1992 s 21.
[89] David Rolph "Publication, Innocent Dissemination and the Internet after Dow Jones & Co Inc v Gutnick" (2010) 33 NSWLJ 562 at 575.
[90] See *Duffy* [2015], above n 62; *Duffy* [2017], above n 59; and *Trkulja (No 5)*, above n 43.
[91] *Duffy v Google LLC* [2023] SASC 13 at [112], [124], and [131].
[92] *Trkulja (No 5)*, above n 43, at [18], [30].

potentially defamatory material."[93] Effectively imposing a duty to monitor the publications of third parties would unreasonably expand liability to include a duty to 'control' third parties.[94] In contrast, negligence might arise if the search engine has a history of moderating, restricting or editing content which is substantially similar to the infringing material, but it has failed to do so in a particular instance.[95] This could disincentivise moderation, blocking, and other preventative measures. For this reason, the Defamation Act 2013 (UK) stipulates that evidence of moderation will be insufficient to defeat a similar defence available to website operators.[96]

Moreover, it unclear whether New Zealand's statutory defence captures internet intermediaries at all.[97] The defence applies to "distributors" and "processors";[98] terms which are ambiguously defined.[99] There is a risk that a judge could interpret the acts of a search engine as creation rather than distribution, meaning that the defence would not apply. In 1999, the Law Commission reviewed the defence in respect of its application to ISPs and recommended reform to align the defence with the broader definitions under section 1 of the Defamation Act 1996 (UK), to avoid any doubt as to its application.[100] As it stands, no such reform has taken place. Without reform, a finding that search engines are prima facie liable risks liability without protection from the statutory defence.

C Assumption of Responsibility

In light of the harshness of prima facie liability, certain academics have advocated for the courts to adopt a fault liability standard, which would apply from the point that the search engine assumes responsibility for a defamatory publication.[101] This assumption of responsibility doctrine generally applies when a disseminator is made aware of a defamatory publication which they have the authority to remove, and neglects to do so

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[93] Chan, above n 44, at 340.
[94] Rolph, above n 52, at 26.
[95] Laidlaw and Young, above n 18, at 128.
[96] Subsection 5(12).
[97] Tobin, above n 16, at 120-121; *A-Z of New Zealand Law*, above n 15, at 59.15.5.4
[98] Defamation Act 1992, s 21.
[99] Defamation Act 1992, s 2.
[100] Law Commission *Electronic Commerce Part II: A Basic Legal Framework* (NZLC R58, 1999) at [269].
[101] Turner, above n 3, at 55; Cheung, above n 41, at 27-29; Gray, above n 75, at 35; and Dario Milo "Fault and Defamation Liability" in *Defamation and Freedom of Speech* (online ed, Oxford Academic, Oxford, 2008) 185 at 219.

within a reasonable time. This should not be interpreted as an intermediary becoming a publisher on receipt of knowledge when it was not one before; rather, liability is constructed on the basis that the intermediary, in its omission to act, has made itself responsible for the ongoing publication from the perspective of a person fully acquainted with those facts.

1 Towards Fault-Based Liability

The concept of liability by the assumption of responsibility can be attributed to the decision in *Byrne v Deane;* an English case in which the proprietors of a golf club were held liable for defamatory words left on their notice board, on the basis that their knowledge of the material and subsequent failure to remove it implied that they had assumed responsibility for it.[102] This was followed in *Urbanchich v Drummoyne Municipal Counsel*, where the Supreme Court of New South Wales found it was open to the jury to infer that the Urban Transit Authority had made itself responsible for the defamatory posters which it had allowed to remain glued to several bus shelters for a month after it had been asked to take them down.[103]

Several judgments from New Zealand and other comparable jurisdictions are indicative of a shift towards fault-based liability for internet intermediaries. This shift has its origins in the mere facilitator doctrine from *Bunt v Tilley,* where Justice Eady considered that "knowing involvement in the process of publication *of the relevant words*" was the necessary mental element to fix an internet non-publisher with responsibility for publishing defamatory content.[104] This knowledge requirement has been applied in respect of internet intermediaries in a few Canadian and New Zealand cases.[105] In *Pritchard v Van nes,* the Supreme Court of British Columbia found that a Facebook user was liable for the posts that other users had made in response to her initial post, on the basis that she had actual knowledge of the content and failed to exercise her ability to remove it.[106] A similar test was applied in New Zealand in *Sadiq v Baycorp.*[107] In New

[102] *Byrne v Deane* [1937] 1 KB 818; [1937] 2 All ER 204.
[103] *Urbanchich v Drummoyne Municipal Council* (1991) Aust Tort Reports 81-127 (NSWSC) at 12.
[104] *Bunt v Tilley*, above n 19, at [23].
[105] Laidlaw and Young, above n 18, at 117.
[106] *Pritchard v Van nes* 2016 BCSC 686, [2016] BCJ 781 at [108].
[107] *Sadiq v Baycorp (NZ) Ltd* [2008] HC Auckland CIV-2007-404-6421 at [58].

Zealand's most recent intermediary liability case, *Murray v Wishart*, the Court of Appeal compared the role of a Facebook host to that of an organiser of a public meeting.[108] In this way, the Court found that the defendant would only be liable if it could be shown that he knew the defamatory comment had been made, and acted in such a way that it could be inferred that he approved of the comments.[109]

Support for the assumption of responsibility doctrine might also be found in certain English cases, albeit to a lesser degree. In *Davison v Habeeb*, the High Court of England and Wales compared Google (in its capacity as the web-host of a Blogger.com site) to the operator of a gigantic notice board, in the sense that it provided a platform for users to post on, but it could not know to take certain notices down without having them pointed out to it.[110] Although Judge Parkes QC accepted it was unrealistic to presume that the defendant, prior to notification, "adopts as its own any of the content which it facilitates," he was unable to conclude that Google could not be a prima facie publisher for the purpose of a summary judgment.[111] The English Court of Appeal in *Tamiz v Google* was faced with another Blogger.com case, and found that Google could not be a publisher unless it knew, or ought to have known, that the publication was likely to be defamatory.[112] However, the court relied on *Emmens v Pottle* for that proposition, effectively incorporating the innocent dissemination defence into the initial criteria for publication.[113] While the case may provide a jumping off point for fault liability, it is unclear whether it supports the proposition that such intermediaries are not prima facie publishers.[114]

2 Defining Responsibility

When applied correctly, the assumption of responsibility doctrine requires an inference that the search engine provider has made itself responsible for a defamatory snippet or autocomplete result by having endorsed or acquiesced to the publication of that content. Laidlaw and Young argue that the approach - as currently applied - is an ineffective

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[108] *Murray v Wishart*, above n 7, at [132].
[109] At [144].
[110] *Davison v Habeeb* [2011] EWHC 3031 (QB), [2012] 3 CMLR 104 at [38].
[111] *Tamiz v Google*, above n 38, at [41], and [47]-[48].
[112] At [26].
[113] At [26].
[114] Dietrich, above n 76, at 99-100.

doctrine because the requirement for a positive assumption of responsibility is not rigorously enforced.[115] This is a valid criticism; the cases show that the courts will readily infer acquiescence if knowledge has been established and the content was not promptly removed.[116] It is suggested that clarification of the elements which are necessary to attribute responsibility could mitigate this issue.

First, for liability under this doctrine to take effect, the search engine must know of the infringing material. The burden of proof lies with the plaintiff; evidence that valid notice has been issued to the defendant should be sufficient. The information which must be conveyed to constitute valid notice will need to be clarified by the courts. Guidance may be taken from existing cases, which indicate that the notice should identify the material in respect of which proceeding are brought, explicitly request that the material be taken down, and provide the reason for the request.[117] The courts could also take inspiration from the notice requirements in section 24 of the Harmful Digital Communications Act (HDCA) 2015. To give rise to further obligations under the section, the notice must identify the complainant and the specific material complained of, explain why the complainant considers the material to be unlawful, and enable the specific material to be readily located.[118] The defence for website operators provided by section 5 of the Defamation Act 2013 (UK) contains similar notification requirements which could also assist the courts. In particular, subsection 6 requires that the notice of complaint explain why the content is defamatory of the complainant.[119] Knowledge of the reason that the content is alleged to be defamatory is a fair threshold; it is reasonable to assume that this would imbue the search engine with a duty to investigate the claim and prevent further publication if it is likely to be defamatory.

Secondly, the search engine must have failed to take the content down within a reasonable period after notification. Here, the courts should be careful to ensure that search engines with insufficient means to address complaints are not misinterpreted as

[115] Laidlaw and Young, above n 18, at 144, 118.
[116] Laidlaw and Young, above n 18, at 118.
[117] *Bunt v Tilley*, above n 19, at [34] and [35].
[118] Harmful Digital Communications Act 2015 subs 24(3).
[119] Defamation Act 2013 (UK) subs 5(6)(b).

having endorsed defamatory material.[120] What is considered reasonable should depend on the volume of complaints and the resources available to the defendant, particularly if the goal is to ensure that only content subject to legitimate complaints is removed.[121] In *Pritchard,* the court suggested that the gravity of the remarks and the ease with which the comments could be removed meant that nothing short of immediate deletion was reasonable.[122] This will not often be true, considering the high volume of complaints fielded by major search engine like Google. The safe harbour provision from the HDCA may again provide a useful baseline. To retain the protections offered by the provision, if an online content host is unable to contact the author of material subject to a valid notice, the content must be removed within 48 hours.[123] The 48 hour time frame is consistent with notice-and-takedown regimes in other jurisdictions, and would serve as an appropriate starting point for the courts.[124]

It is possible that certain factors could negate the presumption that search engines accept responsibility for the allegedly defamatory content which they omit to remove. For example, Laidlaw and Young argue that terms and conditions eschewing liability may undermine inferences of responsibility.[125] Such a contractual agreement will not be enforceable if there is no express offer and acceptance of those terms, though search engines may get around this by requiring users to assent to certain terms when creating an account to use the service. [126] Even so, in New Zealand, such a term is at high risk of being struck out as an unfair contract term under the Fair Trading Act 1986,[127] on the basis that it would cause significant imbalance in the parties' rights to the detriment of the user - especially considering most users would be unaware of its existence.[128] In the unlikely event that such a term is upheld, it is correct to suggest that the courts may find there was no assumption of responsibility, and no liability.[129] In order for the doctrine to function as intended, the courts must be open to the possibly that the conduct which gives rise to an

[120] Laidlaw and Young, above n 18, at 144.
[121] Laidlaw and Young, above n 18, at 156.
[122] *Pritchard v Van nes*, above n 106, at [109].
[123] Harmful Digital Communications Act (2015) subs 24(2)(b).
[124] Defamation (Operators of Websites) Regulations (UK) reg 3, sch cl 3(1).
[125] Laidlaw and Young, above n 18, at 144.
[126] *Halsbury's Laws of England* (5th ed, 2019) vol 22 Contract at [33].
[127] Section 46I.
[128] Fair Trading Act 1986 subss 46L(1) and (2).
[129] Subject to s 53 of the Defamation Act.

inference of responsibility may not be enough to demonstrate an actual assumption of responsibility.[130]

3 Differentiating the Doctrines

While the secondary publisher and assumption of responsibility doctrines produce similar outcomes, there are conceptual and practical differences between the two, particularly in the way that knowledge is incorporated. Under the assumption of responsibility doctrine, proof of knowledge is a prerequisite for liability. This means that the burden of proof lies with the plaintiff, and innocent dissemination is unavailable as a defence. The secondary publisher doctrine, however, has no prima facie knowledge requirement. Knowledge is presumed;[131] to escape liability the defendant must make out the elements of the defence contained in s 21 of the Defamation Act 1992.[132] The knowledge threshold also differs between the doctrines. The assumption of responsibility doctrine requires the plaintiff to prove that the defendant had actual knowledge of the specific words and, as the author has argued, the reason that those words are alleged to be defamatory. In contrast, for the section 21 defence to succeed defendants must establish not only a lack of actual knowledge, but also that they did not know that the publication was likely to contain defamatory material, and that their lack of knowledge was not due to negligence. This makes the affirmative defence comparatively difficult to prove.

Both doctrines allow defendants to escape liability if they take down the defamatory material within a reasonable time.[133] The courts have been generous in their interpretation of reasonableness under the innocent dissemination defence. In *Tamiz*, Richards LJ suggested it was arguable that Google was liable for a "very short" period during the five weeks between notification and takedown.[134] In *Defteros* it was accepted that a reasonable time had lapsed one week after the removal request had been made.[135] Meanwhile, under the assumption of responsibility doctrine, it is suggested that a shorter

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[130] *Urbanchich v Drummoyne Municipal Council*, above n 103, at 12.
[131] *Duffy* [2017], above n 59, at [100].
[132] Latu, above n 86, at 223.
[133] See *Duffy* [2017], above n 59, at [159]; *Defteros*, above n 33, at [113]; and *Google Inc v Trkulja* [2016] VSCA 333, (2016) 342 ALR 504 at [319](1).
[134] *Tamiz v Google*, above n 37, at [35]-[36].
[135] *Defteros*, above n 33, at [161].

timeframe would be more appropriate, considering the speed that information spreads on the internet.

Finally, a defendant's ability to avoid liability by removing defamatory material is restricted if it has to rely on the innocent dissemination defence. Under the secondary publisher doctrine, the removal of the content will not be sufficient for search engines to avail themselves if it is found that they ought to have known that the material was of a character likely to be defamatory, or if their lack of knowledge was due to negligence.[136] Under the assumption of responsibility doctrine, search engines that promptly remove content in good faith will avoid liability.

IV Policy Considerations

In addition to the functionality of the doctrines, there are certain policy considerations which must be taken into account before a definitive position on liability can be reached.

A Protecting the Flow of Information

In New Zealand, developments in the common law "must be consistent with the rights and freedoms contained in the Bill of Rights."[137] The risk that the imposition of liability could encroach on the right to impart and receive information freely should not be understated.[138] If search engine providers must take down content which is alleged to be defamatory or risk litigation, it is inevitable that some of the content which is removed will be lawful.[139] Prima facie liability raises additional freedom of expression concerns, as the limitations of the innocent dissemination defence mean that the doctrine casts a wider net.[140]

However, section 5 of the Bill of Rights Act states that the rights provided by the Act are subject to such limits as can be "demonstrably justified in a free and democratic society." Developments in the common law are not precluded merely because they might encroach

[136] *Murray v Wishart*, above n 7, at [138].
[137] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at 111.
[138] Bill of Rights Act 1990, s 14.
[139] Laidlaw and Young, above n 18, at 149.
[140] Rolph, above n 52, at 26.

upon the rights and freedoms contained in the Act.[141] In that respect, it is important to consider the reputational rights at issue under the tort. It is strongly arguable that preventing the dissemination of defamatory autocomplete terms and snippets is one such reasonable limitation. The 'speech' generated by search engine algorithms, for one, is not particularly informative. It has been argued that autocomplete suggestions, because of character limitations and public knowledge as to how they work, do not impart much information beyond the fact that a particular search has been completed several times before.[142] Similarly, snippets only convey the bare essence of what a webpage is about, to help users to decide whether to venture further.

Of greater significance is the potential for these publications to cause serious harm. Search engines aggregate information about people in a way which is easily accessed.[143] This is exacerbated by the fact that snippets and autocomplete suggestions reveal information to users without requiring them to navigate to the webpages where the content was initially published. Online speech spreads quickly and widely, so the potential to cause reputational damage is magnified.[144] These issues are exemplified by an incident involving the former German First Lady, Bettina Wulff. Wulff launched proceedings against Google in 2012 when she discovered that the autocomplete function suggested terms such as "prostitute" and "red light district" alongside her name.[145] Wulff was concerned that it would damage her relationship with her young son if he accidentally came across the allegations.[146] Some news outlets even alleged that the imputations may have been calculated to damage her husband's political career, demonstrating the potential for such publications to carry political implications.[147]

Furthermore, search engine providers already undertake their own censorship when it comes to autocomplete suggestions and snippets, which indicates acceptance that some free speech limitations are justified. For example, autocomplete queries relating to

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[141] *Hosking v Runting*, above n 137, at 111.
[142] Karapapa and Borghi, above n 4, at 279; and Rolph, above n 57, at 287.
[143] Karapapa and Borghi, above n 4, at 284.
[144] Gray, above n 75, at 19.
[145] "Google sued over Bettina Wulff search results" *BBC* (online ed, England, 10 September 2012).
[146] Alexandra Hudson "Germany's former first lady fights escort rumours" *Thomson Reuters* (England, 11 September 2012).
[147] Hudson, above n 146.

violence, pornography, politics and hate speech are all restricted, as are terms related to piracy, like "torrent."[148] Google has also been known to alter its algorithms so that sites containing offensive content are less likely to appear, such as when it altered its algorithm in France so that searches containing the word "lesbian" did not disproportionately prioritise pornographic material.[149] Furthermore, Google has been operating a voluntary takedown system for complaints concerning the publication of personal information for years.[150] In 2021, Google launched its 'known victim' protocol, which enables victims to report when they have been attacked on pay-to-remove sites, or had explicit images of themselves shared online, allowing Google to "automatically suppress similar content when their names are searched for."[151]

B If not Search Engines… then who?

To impose liability on search engines would also satisfy the need to provide legitimate complainants with access to remedies. Services such as virtual private networks have become increasingly accessible, making it both easier for those who write defamatory material to maintain anonymity, and harder for victims of defamation to pursue litigation against them.[152] If search engine providers were immune to liability, some victims would be left without any way to restrict access to defamatory content, and no mechanisms through which to vindicate their reputations.

This argument is particularly strong in respect of autocomplete predictions. Although autocomplete predictions are the result of the aggregation of popular user searches, it is the search engine that conveys those search terms to third parties. As the only plausible publishers of search engine autocomplete suggestions, it should be open to a complainant

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[148] Michael Smith "Search Engine Liability for Autocomplete Defamation: Combating the Power of Suggestion" (2013) J Law Technol Policy 313 at 317; Jennifer Martinez "Google blocks file-sharing terms" *Politico* (online ed, Washington DC, 27 January 2011); and Tom Simonite "Google's Autocomplete Ban on Politics Has Some Glitches" *Wired* (online ed, California, 11 September 2020).
[149] Melanie Ehrenkranz "Google Fixed Its Algorithm So That Lesbian-Related Searches Are Less Pornographic" *Gizmodo* (online ed, New York City, 7 August 2019).
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[151] Kashmir Hill and Daisuke Wakabayashi "Google Seeks to Break Vicious Cycle of Online Slander" *New York Times* (online ed, New York City, 10 June 2021).
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to sue a search engine for defamation – particularly if they fail to respond to a legitimate takedown request. [153]

C Incentivising Moderation and Response to Notification

It has been argued that prima facie liability could encourage search engine providers to adopt additional defamation screening or filtering techniques.[154] To date, this has not proven to be the case, with major search engines such as Google failing to adopt specific defamatory content filters in Australia. It may be that defamation lawsuits are simply accepted as the cost of dealing on the internet. Even so, pre-publication moderation is not necessarily a preferable outcome. If all content identified as potentially defamatory was subject to human moderation, as proposed by Corbett,[155] this would slow and restrict access to results exponentially; an undesirable prospect, given the high social value that search engines provide.[156] Alternatively, if the content was removed automatically, this would pose unjustified limitation on free speech. On this particular basis, there is no interest in adopting a prima facie liability standard.

On the other hand, there is a risk that total immunity from liability would remove any incentive to respond to notification of defamatory content. Precedent reveals that, without certainty of immunity, search engine providers will generally comply when they have been issued with a takedown request that identifies the allegedly defamatory content with sufficient specificity.[157] If it were confirmed that search engines were passive facilitators, it is unlikely they would respond to takedown requests on good faith alone, even if the content was obviously defamatory. Liability post-notification provides an incentive to promptly respond to such requests.[158]

V Liability in New Zealand

Taking into consideration the practical and policy implications associated with each approach, the assumption of responsibility doctrine is the most appropriate way to

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[153] Chan, above n 44, at 341.
[154] Corbett, above n 3, at 214.
[155] Corbett, above n 3, at 214.
[156] van Hoboken, above n 77, at 193, 198; and Chan, above n 45, at 342.
[157] See *Duffy* [2015], above n 62; *A v Google*, above n 2*;* and *Metropolitan Schools*, above n 28.
[158] Laidlaw and Young, above n 18, at 148-149.

conceptualise search engine liability for defamatory autocomplete predictions and snippets.

It is clear that search engines function to direct and orientate user searches. In light of this, it would be inappropriate for the courts to find that search engines are so removed from the dissemination of snippets and autocomplete predictions that they do not play a meaningful role in their publication. To reject the application of the passive facilitator doctrine in this context would be consistent with the findings in *A v Google,* and ensure that complainants have access to remedies when they have been defamed online, particularly in light of the widespread harm which can be caused by online publication. On this basis, it is clear that some form of liability is appropriate.

In practice, secondary publisher liability does produce substantially similar outcomes to liability by way of assumed responsibility. In each iteration of the *Duffy* case, only post-notification liability was at issue, and Google was only liable after it had failed to remove access to the infringing snippets and autocomplete result within a reasonable time.[159] Likewise, both *Trkulja* claims concerned the post-notification period, and comments about liability prior to notification were speculative.[160] Nevertheless, the two approaches are not equal. The secondary publisher doctrine may require the courts to find that search engines voluntarily participate in the act of curation which results in the defamatory publication, which is contrived, and does not reflect the actual functionality of a search engine. If the doctrine is strict liability, lack of blameworthiness makes it undesirable to find that it applies to search engines. As noted in *Murray*, liability based on anything less than actual knowledge is difficult to reconcile with the nature of defamation as an 'intentional' tort, founded on the presumption of malice.[161]

The limitations imposed by section 21 defence mean that the innocent dissemination defence does not prevent the application of the secondary publisher doctrine from being disproportionately restrictive. Because publishers who were negligent or ought to have

[159] See *Duffy* [2015], above n 62; *Duffy* [2017], above n 59; *Duffy* [2023], above n 91.
[160] See *Trkulja (No 5)*, above n 43; and *Trukulja* [2018], above n 59.
[161] *Murray v Wishart*, above n 7, at [140]; Tobin, above n 16, at 109; Laidlaw and Young, above n 18, at 146; and Dr Eric Descheemaeker "Mapping Defamation Defences" (Research Paper No. 2014/37, Edinburgh School of Law, 2014) at 678.

known about defamatory material are unable to avail themselves of the defence, secondary publisher liability gives undue weight to reputational interests over freedom of expression, which is inconsistent with s 5 of the Bill of Rights Act. Furthermore, under the doctrine search engines are faced with a catch-22, where moderation or the failure to moderate could equally cause the innocent dissemination defence to fail due to negligence.[162] In contrast, when the defence is successfully raised, it is applied in a way that is too generous in the time that search engines are permitted before they must take down the content. This fails to take into account the rate information spreads on the internet, and does little to ameliorate the harm caused by the publication.

In comparison, assessing liability according to whether search engines have met the threshold from which the courts can infer responsibility will ensure that only culpable actors are liable under the tort, while still limiting the spread of defamation. By constructing liability from the point that a search engine has made the choice not to remove content which is alleged to be defamatory, free speech interests are only infringed upon when it is reasonably necessary, and only in respect of the content which is subject to an express compliant. This approach would also provide consistency by ensuring that any search engine can avoid liability by removing defamatory content in a reasonable time post-notification, irrespective of existing moderation practices.

Liability brought about by an assumption of responsibility would be consistent with the test that the New Zealand courts have applied in respect of other internet intermediaries. It would also broadly align with the opinion of scholars who are in favour of a fault liability standard or a statutory notice-takedown regime for secondary publishers of defamation.[163] The assumption of responsibility doctrine is the best way to hold search engines accountable for the creations of their algorithms, while ensuring that the providers of such a beneficial service are not punished for hosting a small amount of defamatory content of which they had no knowledge.

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[162] Laidlaw and Young, above n 18, at 128.

[163] See Gray, above n 75; Milo, above n 101; Dietrich, above n 76; Turner, above n 3; Laidlaw and Young, above n 18; and Ter Kah Leng "Internet defamation and the online intermediary" (2015) 31(1) CLSR 68.

VI Conclusion

So long as the courts maintain their reluctance to explore the parameters of internet intermediary liability,[164] the liability doctrines will continue to be confused, intertwined and misinterpreted. Clarification will benefit search engines and prospective litigants alike, enabling them to direct their conduct in accordance with the legal rule. The Courts of New Zealand should take the opportunity to clarify their position on search engine liability when it presents itself, until such a time as legislation clarifying the position is enacted.

As the "gatekeepers" of the internet, search engines function to objectively facilitate access to relevant webpages, and to subjectively editorialise that access so that the best results are easily located and prominently displayed.[165] The wide reach of snippets and autocomplete suggestions makes it necessary to ensure measures are in place so that the reputational harms which could be caused by the republication of defamatory imputations to millions of users are mitigated. Still, a light touch is required to ensure that the useability of these tools is not diminished by reactions to the prospect of liability. This paper has argued that liability based on a positive assumption of responsibility for the defamatory content should be adopted in New Zealand, as this would provide an avenue for victims to seek a compensation when attempts to get the content removed have been exhausted, without ascribing fault pre-emptively.

[164] *Murray*, above n 7, at [125].
[165] Chan, above n 44, at 342.

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