

# DUFFY V GOOGLE - LIABILITY FOR STATEMENTS MADE BY THIRD PARTIES ONLINE

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Legal Briefings - By **Rebekah Gay** and **Peter FitzPatrick**

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Websites and social media pages that allow consumers to post content are ubiquitous and have become a basic advertising tool for modern businesses. The recent decision in *Duffy v Google*<sup>1</sup> has put a spotlight on the risks to businesses arising from defamatory comments posted by third parties.

This article considers a number of situations where a business can get into difficulty as a result of third party comments. We examine the contrasting outcomes in the case of *Google v ACCC*, where Google was held not to be liable for ads placed by third parties on its search results page, and *Duffy v Google* where Google was found to be liable for the content from websites shown in its 'organic search results'.

## DUFFY V GOOGLE

Dr Duffy engaged the services of various 'psychics' on an internet platform to advise on a new relationship. Contrary to the psychics' predictions, Dr Duffy's relationship ended. Following a number of emotional and public interactions between Dr Duffy and the psychics, a number of reports were posted online alleging that Dr Duffy was a 'stalker' of psychics.

A search for 'Dr Janice Duffy' or 'Janice Duffy' through Google's Australian search engine returned links to these reports. Dr Duffy requested that Google remove the pages from its search results.

Dr Duffy also later discovered that the search engine autocompleted searches beginning 'Janice Duffy' to 'Janice Duffy psychic stalker'. Dr Duffy complained to Google about this as well.

The key question for the Court was whether, by publishing the summaries of the relevant pages in its search results and showing the autocorrect, Google had become a 'publisher' of the relevant statements for the purposes of defamation law. As Google had not itself posted the reports it could not be responsible for their content as a primary publisher. However, defamation law recognises that a person who becomes aware of defamatory material and has the power to remove it but chooses not to do so can become responsible as a secondary publisher.

The Court found that after a reasonable time had passed following the removal requests, Google became a secondary publisher of the defamatory material.

His Honour Justice Blue went so far as to suggest that even continuing to make a URL to the offending content available after a take-down request had been received could make Google responsible as a secondary publisher.

## **GOOGLE V ACCC**

As well as providing organic search results, Google also sells advertising space ('sponsored links') through its 'AdWords' program.

The ACCC complained that a number of advertisers were using the AdWords program in a manner that was likely to mislead or deceive consumers, because the advertisers were using competitors brands as search terms and in their advertisements. The ACCC sued both the advertisers and Google. The Court accepted that this practice was misleading and deceptive.

As with defamation law, consumer protection law recognises a distinction between the person making a misleading representation and an 'intermediary' who passes on that representation. The intermediary can become responsible for the content of the communication, but unlike defamation law, the test is whether it would appear to reasonable consumers that the intermediary had adopted or endorsed the representation.

The Court found that Google merely provided 'a means of communication between advertisers and consumers'. The consumers would have 'understood that representations made by the sponsored links were those of the advertisers, and were not adopted or endorsed by Google'. Accordingly, Google was not liable.

## **ARE THESE RESULTS CONSISTENT?**

At first blush it might appear that the cases produce an odd result, on the one hand Google is responsible for the content of organic links created by automatic copying of parts of third party websites, but it is not responsible for the content of sponsored links that are created and paid for using its AdWords system.

The key difference is in the nature of the representations passed on. In the case of representations alleged to be defamatory the question of liability is solely whether the representations were passed on after Google became aware of them. The question in relation to misleading and deceptive representations is whether a consumer would believe Google had adopted them. There is no requirement that an intermediary be seen to adopt or endorse a defamatory representation beyond simply not removing it.<sup>2</sup>

The distinction may be justifiable on the basis of the underlying aims of the law in these areas. Defamation law is intended to protect a person's right to their good name where misleading and deceptive law is directed to consumer protection. Passing on a defamatory representation *per se* increases the harm caused by the defamatory representation whether or not the representation has been adopted by the intermediary. It is arguable that consumer harm is only exacerbated only where a third party passing on a misleading and deceptive representation itself endorses or adopts the representation or appears to do so.

## TIPS FOR ADVERTISING ONLINE

Where advertisers are operating online using interactive platforms allowing consumer generated content it is necessary to monitor that content to ensure that it does not expose the advertiser to liability.

In the case of allegedly defamatory material, as soon as the advertiser becomes aware of the material, either by seeing the material or through receiving a complaint, it should be removed. If the material is left online the advertiser could become responsible as a secondary publisher. Even a post of a URL to a webpage containing the defamatory material without further comment may be enough to create liability.

In the case of misleading and deceptive material the question is more complex. A simple failure to remove content will not be enough to show that an advertiser has endorsed or adopted the material in all cases. However, there will be circumstances where an advertiser who leaves the content in place would be understood by other consumers to have adopted it. For example, the prominent display of a false claim by a consumer about a competitor's product may well be taken by other consumers to be an endorsement of the claim.

The advertising standards bodies strongly recommend monitoring consumer content<sup>3</sup> and the removal of material that contravenes community standards. Failure to remove misleading and deceptive material could also result in an adverse finding by the Advertising Standards Board or Advertising Claims Board.<sup>4</sup>

## ENDNOTES

1. [2015] SASC 170.

2. In the recent Victorian case of *Von Marburg v Aldred* [2015] VSC 467, which involved allegedly defamatory posts on a Facebook page, Justice Dixon of the Victorian Supreme Court seems to suggest that as well as a failure to remove it is also necessary to show additionally that the defendant has 'acquiesced in or authorised or ratified the communication', [37](d). It is unclear if this is consistent with existing authority.
3. [Best practice guideline - Responsible marketing communications in the digital space.](#)
4. See for example the cases of Diageo Australia Ltd and Fosters Australia [0467/10](#), Asia & Pacific [0271/12](#) where the advertisers were held to be responsible for the content of their Facebook page.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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