

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Niemela v. Malamas*,
2015 BCSC 1024

Date: 20150616
Docket: S146067
Registry: Vancouver

Between:

Glenn J. Niemela also known as Glenn John Niemela

Plaintiff

And

**Strato Malamas, Strato Malamas also known as Doris Ligman
also known as Doris L also known as Vafal also known as Kukaz
also known as Kukaz Kasay, Robin Hood, John Doe #1 also known as
Robin Hood, Larry Roberts, Larry Roberts also known as
Robin Hood, John Doe #2 also known as Larry Roberts also known as
Robin Hood, Vufal, John Doe #3 also known as Vufal, Kukaz Kasay,
John Doe #4 also known as Kukaz Kasay, Kukaz, John Doe #5
also known as Kukaz, Dr. Stephen Johnson, John Doe #6
also known as Dr. Stephen Johnson, Hacer Quepagu, John Doe #7
also known as Hacer Quepagu, Valentino, John Doe #8 also known as
Valentino, John Doe #9, Walter Blackstock, Walter Blackstock
also known as Larry Roberts also known as Robin Hood,
John Doe #10 also known as Walter Blackstock also known as
Larry Roberts also known as Robin Hood, John Doe #11,
John Doe #12, John Doe #13, John Doe #14, John Doe #15,
John Doe #16, John Doe #17, John Doe #18, Doris Ligman,
Jane Doe #1 also known as Doris Ligman, Doris L, and
Jane Doe #2 also known as Doris L**

Defendants

- and -

Docket: S149103
Registry: Vancouver

Between:

Glenn J. Niemela

Plaintiff

And

Google Inc.

Defendant

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Appearing on his own behalf: G. Niemela

Counsel for the Defendant Google Inc.: G.B. Gomery, Q.C.
P.R. Senkpiel

Place and Date of Hearing: Vancouver, B.C.
March 10 and 11, 2015

Place and Date of Judgment: Vancouver, B.C.
June 16, 2015

INTRODUCTION

[1] This application raises the question of whether an Internet search provider is a publisher of defamatory material identified or contained in its search results.

[2] The plaintiff, Glenn Niemela, seeks an interlocutory injunction compelling Google Inc. ("Google") to block from its global search results 146 universal resource locators ("URLs") for websites containing defamatory comments about Mr. Niemela. Google cross-applies for summary judgment dismissing Mr. Niemela's claims against it for defamation, breach of privacy, and malicious falsehood. In the alternative, Google applies to strike portions of Mr. Niemela's notice of civil claim.

BACKGROUND

[3] Mr. Niemela is a Vancouver lawyer. He has been the victim of a campaign of vilification, harassing telephone calls, and extortion attempts since September 2012. In October 2012 and in March 2013, postings concerning Mr. Niemela were placed on two Internet sites: www.ripoffreport.com (“Ripoffreport”) and www.reviewstalk.com (“Reviewstalk”). The postings contain statements about Mr. Niemela and his conduct as a lawyer that are clearly defamatory. Mr. Niemela attributes at least some of this conduct to a former client, the defendant Strato Malamas, who he now believes to be an associate of the Hells Angels.

[4] The police became involved in the matter and identified and spoke to a suspect in May 2012. Thereafter the extortion attempts ended and no further defamatory postings were added to the Reviewstalk and Ripoffreport websites. It is an unfortunate aspect of the Internet, however, that the postings remain and turn up whenever Mr. Niemela’s name is searched on the Internet.

[5] Mr. Niemela took no steps concerning the Internet postings until the fall of 2014, choosing instead to see whether the postings would affect his law practice. He is now convinced that his practice and his billings have dropped dramatically because of the postings and their general accessibility through search engines such as Google.

[6] Mr. Niemela is concerned not only with the negative postings on the Reviewstalk and Ripoffreport sites, but also with the text that accompanies the URLs listed in the Google search results. This text is commonly referred to as a “snippet”. While it is not necessary to replicate the text from offending sites, an example of a snippet may be of assistance to the reader:

Ripoff Report | Glenn J. Niemela Complaint Review ...
www.ripoffreport.com/...glenn-j-niemela/glenn-j-niemela-hes-a-scam...
Oct 18, 2012 - Glenn J. Niemela Complaint Review. Glenn J. Niemela He’s a scam artist and steals from his clients while doing nothing to help them with their...

[7] Mr. Niemela has commenced two actions in an effort to protect his reputation and recover the losses he says he has suffered because of the defamatory postings:

- (i) Vancouver Registry No. S146067 commenced August 2014 against his former client, Strato Malamas, and a host of John Doe defendants (the “Malamas Action”). In that action Google is not named as a defendant. The claims are for defamation, injurious falsehood, inducing breach of contract, intentional interference with economic relations, harassment, conspiracy, and breach of privacy;
- (ii) Vancouver Registry No. S149103 commenced November 2014 against Google (the “Google Action”). The primary claim in this action is against Google for publishing snippets containing defamatory material on its search pages, and for publishing the hyperlinks to websites containing the defamatory postings. The Google Action also makes claims for injurious falsehood and breach of privacy.

[8] Mr. Niemela has obtained two unopposed orders in the Malamas Action requiring those defendants to remove the content of 146 URLs which link to the three offending posts. These orders were not made against Google but Google has voluntarily agreed to remove the 146 URLs from search results on google.ca. Mr. Niemela did not apply for orders against the operators of Ripoffreport and Reviewstalk. Mr. Niemela explained this omission: he has no way of determining precisely where those website operators are located and has no realistic prospect of enforcing an order against them.

ISSUES

[9] As noted earlier, there are two applications before the Court:

1. Mr. Niemela’s application for a mandatory injunction against Google in the Malamas Action to compel Google to block search results for 146 websites worldwide; and

2. Google's application for summary judgment in the Google Action dismissing the plaintiff's claims or alternatively striking portions of the plaintiff's notice of civil claim.

[10] At the time of this hearing, Mr. Niemela was satisfied that Google had removed most of the 146 URLs from its Canadian search platform. He identified a few oversights but was satisfied that Google would voluntarily remove those as well from all searches conducted on google.ca. Mr. Niemela's injunction application is therefore limited to compelling Google to block searches from its worldwide websites in addition to its voluntary blocking of searches done on google.ca. In order to understand the distinction, some explanation of Google's operations is necessary.

[11] Google's search engines make internet search results available through dedicated websites for each country around the world. For example, Google provides internet search services to users in Canada through www.google.ca, to users in the United States through www.google.com, and to users in France through www.google.fr. Despite the existence of country-specific search websites, internet users are not restricted to using the website dedicated to their particular country. A search originating in Canada automatically defaults to google.ca, but users can override that default by choosing to conduct a search on a website designated for another country. In Canada, approximately 95% of Google search users use google.ca. The residual 5% may be explained in part by foreign travellers in Canada wanting to access their home country's site.

[12] The substance of the dispute on the injunction application is whether the removal of search results on google.ca is so inadequate that a mandatory global removal order can and should be made. The substance of the dispute on Google's application to dismiss the defamation claims against it is whether a search engine is a publisher of the materials it turns up in response to a searcher's query.

[13] I will begin with Mr. Niemela's application for an interlocutory injunction.

ANALYSIS**1. Niemela Application for Injunction against Google**

[14] An unusual aspect of Mr. Niemela's application for an interlocutory injunction against Google is that it is made in the Malamas Action in which Google is not a party, rather than in the Google Action. Mr. Niemela appears to have adopted this approach in reliance on *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063. That case recognizes that in extraordinary circumstances a non-party may be compelled to take steps to prevent continuing breaches of court orders by parties to an action (at para. 133).

[15] Google asserts that Mr. Niemela should have brought his application in the action in which Google is a party, and says he cannot in any event be in a stronger position *vis-à-vis* an interlocutory injunction in the Malamas Action than would be the case if he had sought an interlocutory injunction in the Google Action. I agree with that submission.

[16] In any event, I conclude that whether brought against Google as a party in the Google Action or in the Malamas Action against Google as a non-party, the applicant has failed to establish that it is just and equitable to grant the interlocutory injunction sought against Google.

[17] The three-fold test for the granting of an interlocutory injunction is well known. The applicant must establish that there is a fair question to be tried, that he will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours the granting of the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334.

[18] However, this general test cannot be applied in the context of a defamation claim for the reasons given by Bastarache J. speaking for the majority in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 47-48:

47 In my view, the *Cyanamid* test [*American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.)], even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as the two other cases mentioned above [*Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311], involved the commercial context in which the criteria of “balance of convenience” and “irreparable harm” had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity, it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in s. 2(b) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest other than the expression itself, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

48 The inappropriateness of the *Cyanamid* test is confirmed by the jurisprudence relating to injunctions against allegedly defamatory statements, in both England and Canada. In both countries, the *Cyanamid* test has been rejected for injunctions against dissemination of defamatory statements.

[Emphasis in original.]

[19] Instead, in the defamation context the plaintiff faces a much stricter test, as explained by Bastarache J. in his review of the jurisprudence at para. 49:

In *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452, Griffiths J. attempted to define the precise threshold for the granting of an injunction in the following terms (at pp. 455-56):

The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.

. . . *American Cyanamid* . . . has not affected the well established principle in cases of libel that an interim injunction should not be granted unless the jury would inevitably come to the conclusion that the words were defamatory.

This passage has recently been cited with approval in the Quebec Court of Appeal in *Champagne v. Collège d'enseignement général et professionnel (CEGEP) de Jonquière*, [1997] R.J.Q. 2395. Rothman J.A., on this point speaking on behalf of Delisle and Robert JJ.A., went on to comment on the constitutional dimension of these common law approaches to the use of the injunctive power (at pp. 2402-3):

With the coming into force of the Canadian Charter and the Quebec Charter, these safeguards protecting freedom of expression and freedom of the press have become even more compelling.

The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases — where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. Given the value we place on freedom of expression, particularly in matters of public interest, that guiding principle has much to recommend it.

[Emphasis in original.]

[20] As can be seen from the above passages, where defamation is alleged by the party seeking an interlocutory injunction, the threshold required to meet the first part of the three-part *RJR-MacDonald* test is elevated from a “serious question to be tried” to the “clearest of cases” where the words complained of are “manifestly defamatory”. This elevated threshold in defamation cases was also discussed by Grauer J. in *Gant v. Berube*, 2013 BCSC 1721 at paras. 12 and 16.

[21] To show the statements are manifestly defamatory the plaintiff must satisfy the test for defamation as articulated in *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28:

(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[22] As I will explain further below, a central question on Google's application is whether Google published the words complained of by Mr. Niemela. However, it is not necessary to determine that question here in order to dispose of the application for an injunction against Google.

[23] That is so because even if the plaintiff were to meet the heightened threshold at the first step of the *RJR-MacDonald* test, his application fails on the second and third steps for the following reasons.

[24] First, there is insufficient evidence of irreparable harm to Mr. Niemela if the injunction is not granted. As I have noted, Google has voluntarily removed the 146 URLs from searches conducted on google.ca. Mr. Niemela is a Vancouver lawyer. In the notice of civil claim in the Google Action Mr. Niemela states he has from time to time represented clients in Finland and that his family resides in Finland and Sweden. However, he has never practised outside of British Columbia. The vast majority of his work is done for Canadian clients.

[25] Mr. Niemela argues that only a worldwide removal of the offending search results will suffice. He submits:

164. [H]is and indeed any person's honour, reputation and personal privacy ought [not] to be marginalized or compartmentalized to solely one jurisdiction, being Canada, by solely blocking the offending URLs from google.ca. Niemela ought not to be marginalized or compartmentalized by referring to him only in his professional capacity and then only as a "local lawyer".

165. Persons in Canada can access other google sites such as google.com (U.S.), google.fr (France) and google.fi (Finland), google.au (Australia) and so on.

166. Niemela specifically has [relationships] with people in Sweden and Finland.

[26] Google provided evidence of the number of searches conducted with reference to Mr. Niemela on google.ca and google.com between August 1, 2013, and September 30, 2014. During this 14-month period, more than 90% of searches of Mr. Niemela's name in English originated from Canadian IP addresses, with the balance originating from US IP addresses. There were 262 searches of "glenn niemela", "glenn j niemela", and "glenn j. niemela" from Canadian IP addresses during this period, and 22 from US IP addresses. It is not known how many of these were conducted by Mr. Niemela or at his request, but given his affidavit evidence monitoring the search results, it is certain that many originated with him. On average, then, there were a total of 21 searches per month in Canada and the US, some of which originated with the applicant.

[27] Google did not provide information regarding searches conducted on google.fi (Finland) or google.se (Sweden). However, Mr. Niemela did not suggest searches on these websites were likely to have surpassed searches on the Canadian or US sites.

[28] Further, while Mr. Niemela attributes the decline in his law practice to the defamatory statements and their general accessibility through search engines such as Google's, there are other possible explanations. A disciplinary history with the Law Society is prominently revealed in Google searches of "Glenn Niemela".

[29] Second, the 146 URLs voluntarily blocked by Google on google.ca have not been replaced by new, high ranking URLs as was the case in *Equustek*. In that case, websites blocked by Google were immediately replaced by an endless iteration of automatically generated websites leading to the same material. In the present case, Mr. Niemela has identified additional URLs but they appear to be pre-existing links buried deep in search results. For example, in his tenth affidavit sworn January 20, 2015, Mr. Niemela states:

2. On January 6, 2015 I did a Google search of "Glenn Niemela".
3. I searched to the last page displayed on the search results. The last page was page 38. Page 38 has the following notation:

In order to show you the most relevant results, we have omitted some entries very similar to the 380 already displayed.

If you like, you can repeat the search with the omitted results included.

Attached hereto as Exhibit "A" to this my affidavit (pages 3 and 4 of this affidavit) is a copy of page 38.
4. When I clicked on the above notation on January 6, 2015 the search on "Glenn Niemela" expanded to 69 pages.
5. On January 14, 2015 twenty-two (22) defamatory snippets and an associated twenty-one (21) URLs are released on this second layer of Google searches.

[30] Each page on Google's search results contains 10 URLs, with the most relevant and useful at the top of the list. I take judicial notice of the fact that few searchers will be motivated to move through 380 search results on 38 pages to

reach what Mr. Niemela describes as “the second layer”. In any event, Google has agreed to block those URLs as well, voluntarily removing them from google.ca.

[31] I conclude that Google’s voluntary removal of URLs identified by Mr. Niemela has provided an effective means of preventing searchers in Canada from finding the links to the offending websites. An injunction is not therefore required to prevent the vast majority of the potential harm complained of by Mr. Niemela.

[32] Third, Mr. Niemela has waited two years to apply for an interlocutory injunction. I am not satisfied that there is any sudden urgency to justify granting an interlocutory injunction ahead of the injunction to be sought at trial.

[33] Finally, the Court is reluctant to make an order that cannot be complied with. Mr. Niemela acknowledges that Google is not able to comply with an order compelling it to block defamatory search results in the United States. Two federal statutes, the *Communications Decency Act of 1996*, 47 USC (1996), and the *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act*, 28 USC (2010), protect internet providers such as Google and block enforcement orders that would infringe on the First Amendment right to free speech.

[34] While United States courts will generally recognize and enforce foreign judgments, they will not do so if enforcement of the foreign court’s order would violate the corporation’s constitutional rights to free speech: *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F Supp 2d 1181 (ND Cal 2001) at 1192-1193, rev’d on other grounds 379 F 3d 1120 (9th Cir 2004).

[35] Taking all of these factors into account, I conclude that this is not a case “in which it appears to the court to be just or convenient that the order should be made”: *Law and Equity Act*, R.S.B.C. 1996, c. 253 s. 39.

2. Google's Application to Dismiss

[36] In the Google Action in which it is a defendant, Google applies for summary judgment under Rule 9-6(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009:

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Rule 9-6(5) provides the following three distinct bases for granting summary judgement under Rule 9-6(4):

- (a) there is no genuine issue for trial with respect to a claim or defence;
- (b) the only genuine issue is the amount to which the claiming party is entitled; or,
- (c) the only genuine issue is a question of law.

[37] In this case Rule 9-6(5)(b) is not applicable. The distinction between Rule 9-6(5)(a) and (c) was recently summarized by Madam Justice Russell in *Edgar v. The British Columbia Institute of Technology*, 2015 BCSC 710 at para. 9:

[9] On application for summary dismissal under Rule 9-6, evidence is not only admissible, but may be required. The analysis under Rule 9-6(5)(a) is concerned with whether, based on all the material, the claim is so factually without merit that it is manifestly clear that there is no genuine issue to be tried. If the court reaches that conclusion, it must dismiss the claim; there is no discretion. Alternatively, under Rule 9-6(5)(c), the court may consider whether, by answering a straightforward legal question, it could dispose of the claim. If the court is so satisfied, it has the discretion to dismiss the claim.

[38] On applications for summary judgment, the Court will not weigh evidence, assess credibility, or draw inferences against the party defending the application. The Court will only decide issues of law where there is no dispute about the material facts.

[39] Google applies for summary judgment dismissing Mr. Niemela's claims under four causes of action:

- i. Slander;
- ii. Breach of the *Privacy Act*;
- iii. Libel; and
- iv. Injurious Falsehood.

[40] I will consider each cause of action in turn.

i. Slander

[41] Slander by definition is an oral communication that is defamatory. The plaintiff's claim for slander is bound to fail because he neither pleads nor provides any evidence of oral communications by Google and its representatives. Indeed Mr. Niemela acknowledges this to be so. After receiving Google's notice of application he brought a third notice of application to amend his notice of civil claim to delete the claim in slander.

[42] This claim has no prospect of succeeding and I therefore dismiss it.

ii. Breach of the Privacy Act

[43] Mr. Niemela claims that the snippets contained in Google's search results violate his right to privacy under the *Privacy Act*, R.S.B.C. 1996, c. 373. Section 1 of that Act provides:

Violation of privacy actionable

1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[44] This statutory tort requires a reasonable expectation of privacy on the part of the plaintiff. There is no factual pleading in the notice of civil claim that could give rise to a reasonable expectation of privacy in this case and none is alleged.

[45] Section 1(2) of the *Privacy Act* provides that “[t]he nature and degree of privacy to which a person is entitled ... is that which is reasonable in the circumstances....” Mr. Niemela can have no reasonable expectation of privacy in relation to how he performs his professional work. Work is in general a public aspect of a person’s life. While there are exceptions, such as solicitor-client privilege, a lawyer’s work with clients is conducted in a public forum. In reality, Mr. Niemela’s complaint is not that the articles describe an area of his life that he expects to be kept private and sheltered from public view, but rather that they are unflattering and false descriptions of his work performance.

[46] The cases Mr. Niemela relies on to support an expectation of privacy are easily distinguishable from the present one. In *Griffin v. Sullivan*, 2008 BCSC 827, both the plaintiff and defendant were members of a group of about 100 people who posted messages to an internet news group called “alt.suicide.holiday”. Most members of the group had experienced or were experiencing thoughts of committing suicide and sought support online from other members. While some people identified themselves in their postings, most used a pseudonym, including the plaintiff. Halfyard J. observed at para. 81:

The people who posted messages to ASH were either depressed or suicidal or both. Many of the messages disclosed highly confidential personal feelings. Many of the postings used language of extreme profanity to respond to messages sent by other members of the group, and to make accusations and counter-accusations against other members of the group. The plaintiff testified that it was extremely important to him that his identity be concealed.

[47] The defendant and the plaintiff had heated exchanges on the website. The defendant prevailed upon the plaintiff’s former girlfriend to provide him with the

plaintiff's real name, address and other personal information. The defendant posted this information and a picture of the plaintiff on the website. The Court held that the plaintiff had an expectation of privacy in relation to postings on that website, and that the defendant had violated that privacy wilfully and without claim of right (at para. 84).

[48] *Douez v. Facebook, Inc.*, 2014 BCSC 953, involved Facebook's use of Facebook users' images in its advertising without their consent. Section 3(2) of the *Privacy Act*, misappropriation of the name or likeness of a person for commercial purposes, was in issue.

[49] In the present case, there are no facts alleged to support a breach of privacy other than Mr. Niemela's complaint that Google has published defamatory words through the snippets attached to URLs in search results.

[50] Mr. Niemela's assertion that he has a privacy interest in not having his reputation harmed conflates the concepts of privacy and reputation. Although the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 121 [*Hill v. Scientology*], identified reputational interest and privacy as the two values underlying the plaintiff's protection in defamation, it does not follow that defamatory comments therefore give rise to a breach of the statutory right to privacy. Mr. Niemela's factual allegations and his claim for injury to reputation fall squarely within the law of defamation. As noted in Raymond E. Brown, *Brown on Defamation*, 2nd ed., loose-leaf (consulted on 9 June 2015), (Toronto: Carswell, 1999), vol. 1, ch 1 at 1-2:

The central characteristic of this cause of action is to provide a remedy for publications damaging to a person's reputation. The law of defamation, therefore, provides an appropriate legal vehicle by which persons may vindicate their personal and business reputation. [Footnotes omitted.]

[51] In short, there is a tailor-made cause of action addressing the harm complained of by the plaintiff. That cause of action should be used rather than adopting a scattergun approach, pleading multiple causes of action which do not fit

the bill. That practice is to be discouraged. Mr. Niemela's claim is plainly in defamation. There is no prospect of succeeding in a claim for breach of privacy. I would accordingly dismiss that claim.

iii. Libel

[52] As I have already noted, to establish defamation a plaintiff must prove on a balance of probabilities that:

1. the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
2. the words in fact referred to the plaintiff; and
3. the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[53] Turning to the first stage of the test, some of the snippets complained of do not appear to be defamatory. For example, the following snippet would not lower Mr. Niemela's reputation in the eyes of a reasonable person: "Glenn John Niemela claims to be an attorney specializing in civil and commercial litigations. However, what he really specializes in is ...". On the other hand, some of the snippets clearly contain defamatory words that refer to the plaintiff.

[54] Thus, the central question on this application is whether Google published the search results and snippets the plaintiff identifies as defamatory.

[55] Mr. Niemela claims that Google was at all material times a publisher of:

- (a) Statements contained in text found at URLs identified in search results and
- (b) Snippets of text reproduced in search results.

a) Is Google a publisher of the text found at URLs identified in search results?

[56] The claim that Google is a publisher of statements contained on websites whose URLs are identified in a search cannot succeed in light of *Crookes v. Newton*, 2011 SCC 47.

[57] In that case, the defendant Newton operated a website in which he referred to the plaintiff Crookes and provided a hyperlink to an allegedly defamatory article, and another hyperlink to a page containing other articles said to be defamatory of Crookes. Crookes sued Newton for defamation, alleging that by creating the hyperlinks or, alternatively, by refusing to remove the hyperlinks when told of their defamatory character, Newton was rendered a publisher of the articles. The action failed in all courts.

[58] Three judgments were given in the Supreme Court of Canada, all concurring in the result, but differing as to the test to be applied in determining when, if ever, a hyperlink should be seen as publication of the material to which it refers.

[59] Speaking for six judges, Abella J. held that a hyperlink, by itself, should never be seen as publication of the content in question (at para. 44). She traced the development of the common law from a traditional broad rule that captured any act by which defamatory meaning was conveyed to a third party to a more nuanced approach. She approved of this development and, at para. 21, pointed to two recent English cases that expanded upon this trend: *Bunt v. Tilley*, [2006] EWHC 407, [2006] 3 All E.R. 336 (Q.B.); *Metropolitan International Schools Ltd. v. Designtecnica Corp.*, [2009] EWHC 1765, [2011] 1 W.L.R. 1743 (Q.B.). She stated at para. 26:

[26] A reference to other content is fundamentally different from other acts involved in publication. 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. Even where the goal of the person referring to a defamatory

publication is to expand that publication's audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition. [Emphasis in original.]

[60] Here, the URLs in the search results (identified by the plaintiff as leading to defamatory text) are hyperlinks to websites. Following *Crookes*, Google has not published the content of the text accessible through the URLs. As a result, it is manifestly clear that the plaintiff's defamation claim arising from the URL's listed in Google's search results cannot succeed, and I dismiss that claim.

b) Can the question of whether Google is a publisher of the snippets be determined by summary judgement?

[61] The plaintiff submits that *Crookes* did not consider whether an internet search engine such as Google is a publisher of snippets. Google acknowledges that the narrow ratio of *Crookes* is that the provision of hyperlinks does not constitute publication of the material to which reference is made. Google contends, however, that the underlying principles adopted by the Supreme Court of Canada in *Crookes*, in conjunction with the English decisions specifically addressing snippets, establish that, in law, Google is not a publisher of search results or snippets.

[62] The specific question of whether snippets in a search result constitute publication is a novel one in British Columbia. Mr. Niemela asserts that on this basis alone, the issue should not be determined on a chambers application for summary judgment. He relies on *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2011 BCSC 628, in which Mr. Justice Sewell cautioned against interpreting Rule 9-6(5)(c) too broadly and concluded at para. 20 that a court should decide an issue of law only if there is no real dispute about material facts and the issue of law is well settled:

[20] I think I should also be cautious about deciding issues of law on this application. I am of the view that I should decide an issue of law only if I am satisfied that there is no real dispute about the material facts and that the

issue of law is well settled by authoritative jurisprudence. It seems to me that Rule 9-7 is better suited for deciding novel points of law because on a summary trial the court will have a more complete record framing the question of law. I also note that Rules 9-3 and 9-4 are available for determining points of law on an agreed record.

[63] While the decision in *L.D.* was subsequently overturned, the British Columbia Court of Appeal endorsed the comments quoted above: 2012 BCCA 491 at para. 19.

[64] However, Sewell J.'s comments must be read in context. In that case, the plaintiff commenced a proposed class proceeding against the Provincial Health Services Authority ("PHSA"). At the time of the birth of the plaintiff's child, the PHSA had a policy to take a blood sample from newborns with parental consent in order to test for possible genetic disorders. Samples were retained for 19 years to facilitate re-testing in the event of subsequent illness, for quality assurance and to develop better or new test processes. The plaintiff mother gave consent to have the samples taken, but claimed she would not have given consent had she been aware of the storage of the samples beyond the initial testing period.

[65] The plaintiff's statement of claim alleged the blood samples were obtained through negligent or fraudulent concealment of material facts. It further alleged the collection and storage of the samples was an unlawful seizure contrary to s. 8 of the *Charter* and a tort under the *Privacy Act*. The Health Authority applied for dismissal of the plaintiffs' claims pursuant to Rule 9-6(4). The chambers judge found it unlikely the mother would have refused consent to the taking of the samples had full disclosure of their storage and use been provided. The judge dismissed all of the claims and granted leave to amend to address the issue of whether the Health Authority acted improperly in making the samples available to outside parties for medical research purposes, thereby giving rise to a tort under the *Privacy Act* or a breach of fiduciary duty. The plaintiffs appealed.

[66] The appeal was allowed on the basis that the issues raised by the action were unsuitable for resolution under Rules 9-6(4) and (5) (at para. 20).

[67] The Court of Appeal stated at paras. 18-19:

[18] That said, I agree with counsel for the appellants that this law suit is novel in the sense that there are very few civil cases in Canada that have sought relief under the *Charter* for alleged *Charter* violations. It is very much an open question as to what the test for consent should be when the plaintiff or claimant seeks damages alleging that his privacy rights have been breached under s. 8 of the *Charter*. The same can be said about the *Privacy Act* and perhaps, the misrepresentation claim.

[19] In my view the test for consent in these circumstances cannot be debated without a proper factual foundation on which to explore, develop and apply the tests. I agree with what the chambers judge said in his paragraph 20 to which I earlier referred.

[68] In contrast, the present case raises the well-established cause of action of defamation. The novel aspect of the claim is the method of publication (by way of snippets).

[69] Further, in the present case the factual foundation is before the Court and is not in dispute; the Court is not required to weigh evidence, assess credibility, or draw inferences against Mr. Niemela.

[70] Mr. Niemela argues that a fuller evidentiary record is required in order to assess whether Google is a publisher of snippets. At paragraph 55 of his written argument Mr. Niemela put it this way:

55. Quaere whether in *Niemela v. Google Inc.* Google is a first or main publisher or a subordinate publisher of the second layer of search results. The answers to the following questions are unknown and may be answered upon examination for discovery of a representative of Google:
- i. why on Google.ca are there 140 URLs and [210] snippets in the second layer of search results when there are only 7 URLs and 7 snippets in the first layer of search results on Google.ca?
 - ii. why does Google have a second layer of search results;
 - iii. when were the 140 URLs and [210] snippets in the second layer of search results created?
 - iv. who created the 140 URLs and [210] snippets in the second layer of search results?

[71] With respect, none of these unknown facts is material to the issue of whether Google is a publisher of the snippets that appear in the search results. All of the questions relate to how Google ranks the search results. When Mr. Niemela uses the term the “second layer” he is referring to Google’s practice of displaying the first 38 pages of results. At the bottom of the 38th page, the user is offered the option of clicking through to another 31 pages of search results. Why Google does not simply offer all 69 pages immediately rather than asking searchers whether they wish to receive more search results can have no material relevance to whether Google is a publisher of any snippets. None of the “unknown facts” identified by Mr. Niemela go to that question.

[72] I conclude that the material facts are not in dispute:

- (a) Search results and ‘snippets’ on Google’s websites are generated automatically through the operation of computer algorithms in response to search terms inputted by users.
- (b) Google’s proprietary algorithm is programmed by Google to rank search results according to their probable perceived relevance to users.
- (c) Google maintains different search platforms for different countries and search results may vary from platform to platform.
- (d) The search results generated by the algorithm are generated from the automated review of more than 60 trillion websites. They are continuously updated and may vary from hour to hour or even from minute to minute.
- (e) Google’s search platforms provide a means for internet users to locate websites hosted by third parties that may be of interest to the user.

- (f) Google does not promote or endorse particular search results. It neither warrants the reliability of websites generated in search results nor cautions the user that the authors of statements found on websites may not be trustworthy.
- (g) Google does not amend search results for commercial gain.
- (h) A single page of search results generally displays 10 results, with hyperlinks to third party websites accompanied by snippets of text from those sites. More results are displayed on further pages.
- (i) Pages may include third party advertising which is identified as such.
- (j) Search results reflect the content of third party websites at the time the sites were last crawled by the computers processing Google's search algorithm. Changes in the site by the third party host may not be reflected in search results until the page is crawled again by Google's computers processing the algorithm. Google does not control the content of third party websites, nor changes to those websites.

[73] As stated in *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 10, it is essential to justice that claims disclosing real issues proceed to trial, however:

The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage.

[74] The Court also noted at para. 11:

[T]he bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial" ... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence,

or risk summary dismissal ... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts

[75] I am satisfied that there is no genuine issue of material fact requiring trial on the defamation issue. The material evidence about the way the search results are generated and what they look like is before the Court and is not challenged.

[76] Mr. Niemela argues that some courts in other jurisdictions such as Hong Kong, New Zealand, and Australia (in the Supreme Court of Victoria) have declined to determine a similar question on a summary application: *Dr. Yuen v. Google Inc.*, [2014] 4 HKLRD 493 at para. 106 [Yuen]; *A. v. Google New Zealand Ltd.*, [2012] NZHC 2352 at para. 71; *Trkulja v. Google Inc. (No. 5)*, [2012] VSC 533. Google points out that other jurisdictions, notably the U.K. in *Bunt v. Tilley* and *Metropolitan*, and the Australian Supreme Court of New South Wales in *Bleyer v. Google Inc.*, [2014] NSWSC 897, have addressed this question on a summary basis.

[77] The decision of whether to address an issue by way of summary judgment depends on the particular question of law and the nature of the evidentiary record before the court. While other jurisdictions have commented on the novelty of the question and the need to consider public policy implications, in Canada these issues have been considered by the Supreme Court of Canada in *Crookes*, and in British Columbia by this Court in *Weaver v. Corcoran*, 2015 BCSC 165.

[78] In considering the preliminary issue of whether I should make a determination by way of summary judgment I conclude that I have the factual framework to do so; what remains is a legal question that can be determined under Rule 9-6(5)(c): Is Google a publisher of snippets?.

c) *Is Google a publisher of the snippets?*

[79] The plaintiff submits that Google is a publisher because it intends to create webpages containing lists of hyperlinks and snippets; Google created its computer

program to generate search results and should be responsible in law for acts done by its “tool”: *Trkulja* at paras. 16, 18; *Yuen* at para. 103.

[80] In *Trkulja* Beach J. decided that it was open to the jury to conclude that Google was a publisher of search results (at para. 18). He reasoned (at para. 20):

20 As was pointed out by counsel for the plaintiff in his address to the jury, the first page of the images matter (containing the photographs I have referred to and each named “Michael Trkulja” and each with a caption “melbournecrime”) was a page not published by any person other than Google Inc. It was a page of Google Inc.’s creation – put together as a result of the Google Inc. search engine working as it was intended to work by those who wrote the relevant computer programs. It was a cut and paste creation (if somewhat more sophisticated than one involving cutting word or phrases from a newspaper and gluing them onto a piece of paper). If Google Inc.’s submission was to be accepted then, while this page might on one view be the natural and probable consequence of the material published on the source page from which it is derived, there would be no actual original publisher of this page.

[81] A contrary view was expressed by Eady J. of the English Court of Queen’s Bench in *Metropolitan*. In that case the claimant was in the business of providing adult distance learning courses. It was the subject of disparaging and defamatory comments on electronic bulletin boards maintained by the defendant, Designtecnica. Metropolitan sued Designtecnica and Google Inc. (described in the judgment as the “Third Defendant”) for defamation. The claim against Google was that it was publishing the defamatory comments through search results and snippets provided in connection with search results.

[82] The matter came before Eady J. on Google’s application to set aside a without notice order for service outside the country. Google maintained that it was not a publisher, the action had no reasonable prospect of success, and that service *ex juris* ought therefore to be set aside. Google’s application succeeded.

[83] Eady J. confronted the issue squarely under the heading “Can the operator of a search engine be liable for publication?” (at paras. 35-64). He held that the act of publication, giving rise to liability in defamation, requires a mental element, stating at para. 49:

49. It has been recognised, at common law, that for a person to be fixed with responsibility for publishing defamatory words, there needs to be present a mental element. I summarised the position in *Bunt v Tilley* [2007] 1 WLR 1243. paras 21-23:

"21. In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication.

...

23. Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process...."

[Emphasis in original.]

[84] Eady J. held that the generation of search results and snippets by an automated process could not constitute "knowing involvement in the process of publication of the relevant words". Eady J. explained at paras. 50-53:

50. When a search is carried out by a web user via the Google search engine it is clear, from what I have said already about its function, that there is no human input from the Third Defendant. None of its officers or employees takes any part in the search. It is performed automatically in accordance with computer programmes.

51. When a snippet is thrown up on the user's screen in response to his search, it points him in the direction of an entry somewhere on the Web that corresponds, to a greater or lesser extent, to the search terms he has typed in. It is for him to access or not, as he chooses. It is fundamentally important to have in mind that the Third Defendant has no role to play in formulating the search terms. Accordingly, it could not prevent the snippet appearing in response to the user's request unless it has taken some positive step in advance. There being no input from the Third Defendant, therefore, on the scenario I have so far posited, it cannot be characterised as a publisher at common law. It has not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator.

52. Analogies are not always helpful, but there will often be resort to analogy when the common law has to be applied to new and unfamiliar concepts. Here, an analogy may be drawn perhaps with a search carried out in a large conventional library. If a scholar wishes to check for references to his research topic, he may well consult the library catalogue. On doing so, he may find that there are some potentially relevant books in one of the bays and make his way there to see whether he can make use of the content. It is

hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue. On the other hand, if the compilers have made an effort to be more informative, by quoting brief snippets from the book, the position may be different. Suppose the catalogue records that a particular book contains allegations of corruption against a living politician, or perhaps it goes further and spells out a particular activity, such as "flipping" homes to avoid capital gains tax, then there could be legal liability on the part of the compiler under the "repetition rule": see e.g. *Gatley on Libel and Slander* (11th edn) at paras 11.4 and 32.8.

53. No doubt it would be said here too, by analogy, that the Third Defendant should be liable for repeating the "scam" allegations against the Claimant. Yet, whereas a compiler of a conventional library catalogue will consciously at some point have chosen the wording of any "snippet" or summary included, that is not so in the case of a search engine. There will have been no intervention on the part of any human agent. It has all been done by the web-crawling "robots".

[Emphasis added.]

[85] Thus, the English decisions of *Bunt v. Tilley* and *Metropolitan* narrowed the scope of what amounts to publication sufficient to establish a *prima facie* case of defamation, through the development of a "passive instrument" test.

[86] As I have noted in disposing of Mr. Niemela's claim that Google is a publisher of the hyperlinks contained in its search results, *Metropolitan* was considered by the Supreme Court of Canada in *Crookes*, a defamation case originating in British Columbia. At para. 21 Abella J. speaking for six judges approved the approach taken in *Bunt v. Tilley* and *Metropolitan*:

[21] Recently, jurisprudence has emerged suggesting that some acts are so passive that they should not be held to be publication. In *Bunt v. Tilley*, [2006] EWHC 407, [2006] 3 All E.R. 336 (Q.B.), considering the potential liability of an Internet service provider, the court held that in order to hold someone liable as a publisher, "[i]t is not enough that a person merely plays a passive instrumental role in the process"; there must be "knowing involvement in the process of publication of the relevant words" (para. 23 (emphasis in original); see also *Metropolitan International Schools Ltd. v. Designtecnica Corpn.*, [2009] EWHC 1765, [2011] 1 W.L.R. 1743 (Q.B.)).

[87] In *Crookes* there were two additional judgments concurring in the result but differing slightly in their analysis. Yet all of the judges in *Crookes* accepted the principle that publication requires a deliberate act in relation to the words in question.

I have already referred to the reasons of Abella J. on this point at para. 26 of *Crookes*.

[88] In concurring reasons, at paras. 50 and 51, McLachlin C.J. and Fish J. advanced an alternative publication standard for hyperlinks:

[50] In sum, in our view, a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to.

[51] It is true that the traditional publication rule does not require the publisher to approve of the material published; he or she must merely communicate that material to a third party. However, the proposed adoption or endorsement standard for references is conceptually different. A mere reference without any adoption or endorsement remains that — a content-neutral reference.

[89] Deschamps J., in her concurring reasons, also noted that proof of publication is necessary in order to establish liability for defamation. At para. 55 she referred to the traditional test for publication:

[P]ublication has two components: (1) an act that makes the defamatory information available to a third party in a comprehensible form, and (2) the receipt of the information by a third party in such a way that it is understood.

[90] At para. 56 she framed the issue before the court as “whether the first component of publication needs to be reconsidered owing to the impact of new forms of communications media.”

[91] Deschamps J. concluded that only deliberate acts can lead to liability:

[59] A more nuanced approach to revising the publication rule, and one that can be applied effectively to new media, would be for the Court to hold that in Canadian law, a reference to defamatory content can satisfy the requirements of the first component of publication if it makes the defamatory information *readily available* to a third party in a comprehensible form. In addition, the Court should make it clear that not every act, but only *deliberate* acts, can lead to liability for defamation. [Emphasis in original.]

[92] In considering these passages in *Crookes* I am mindful that the narrow ratio of that case is that providing a hyperlink does not constitute publication of the article

to which the hyperlink leads. *Crookes* did not address snippets and indeed Abella J. stated at para. 42:

[42] Making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be “published” by the hyperlinker. [Emphasis added.]

[93] A snippet repeats words from the hyperlinked article and, as in the present case, those words can be defamatory. For example, the following text is taken from one snippet displayed in the Google search results of Mr. Niemela’s name: “Glenn J. Niemela complaint review: Glenn J. Niemela he’s a scam artist and steals from his clients while doing nothing to help them with their ...”.

[94] Using the traditional approach to publication, Google’s lack of awareness of the content of the words it repeated on a search page snippet would not prevent it from being a publisher, although it would likely be able to avail itself of the defence of innocent dissemination after the *prima facie* test for defamation had been made out. As Abella J. noted at para. 18 of *Crookes*:

[18] Under this sole disseminator/sole reader paradigm, the breadth of activity captured by the traditional publication rule is vast. In *R. v. Clerk* (1728), 1 Barn. K.B. 304, 94 E.R. 207, for example, a printer’s servant, whose only role in an act of publication was to “clap down” the printing press, was found responsible for the libels contained in that publication, despite the fact that he was not aware of the contents (p. 207). In *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), pointing at a sign displaying defamatory words was held to be evidence of publication. Other cases have also held that acts merely facilitating communication can amount to publication: see, e.g., *Buchanan v. Jennings*, [2004] UKPC 36, [2005] 1 A.C. 115; *Polson v. Davis*, 635 F.Supp. 1130 (D. Kan. 1986), aff’d 895 F.2d 705 (10th Cir. 1990); *Crain v. Lightner*, 364 S.E.2d 778 (W. Va. 1987), at p. 785; and *Spike v. Golding* (1895), 27 N.S.R. 370 (S.C. *in banco*). And in *McNichol v. Grandy*, the defendant was found to be liable when he raised his voice and made defamatory statements that were overheard by someone in another room.

[95] As I have noted, however, the tenor of *Crookes* and of recent jurisprudence in England is to narrow the test for who is a publisher of defamatory material to those who do deliberate acts. In Canada this shift originates in the Supreme Court of

Canada's recognition post-*Charter* "that what is at stake in an action for defamation is not only an individual's interest in protecting his or her reputation, but also the public's interest in protecting freedom of expression": *Crookes* at para. 31, citing *Hill v. Scientology*.

[96] It is worth noting at this point that the English approach requiring a deliberate act to establish publication (the passive instrument test) is related to, but distinct from, the defence of innocent dissemination which is a well-settled principle in Canadian defamation law.

[97] As described in *Crookes* at para. 20 and in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 89, a defendant in a subordinate publisher role can avail itself of the defence of innocent dissemination by showing that it:

1. had no actual knowledge of an alleged libel;
2. is aware of no circumstances to put it on notice to suspect a libel; and
3. committed no negligence in failing to find out about the libel.

[98] In short, the defence is available to defendants who, while not the creator of the defamatory material, disseminate the material in a manner that would ordinarily amount to publication save for the innocent nature of the dissemination.

[99] In substance, the passive instrument test appears to have requirements very similar to the defence of innocent dissemination. However, it shifts the burden of proof from the defendant to the plaintiff. Where innocent dissemination is pleaded, the defendant bears the burden of showing that it had no actual knowledge of an alleged libel, was aware of no circumstances to put it on notice to suspect a libel, and committed no negligence in failing to find out about the libel.

[100] On the other hand, if the passive instrument test is applied the plaintiff bears the burden of showing that the defendant was not a mere passive instrument

because at the initial *prima facie* stage the plaintiff must prove the third element of publication.

[101] The majority in *Crookes* did not expressly adopt the passive instrument test for publication, but Abella J. endorses *Metropolitan* which applied it. Furthermore, much of the majority's reasoning for concluding on public policy grounds that hyperlinks should not be treated as publication, applies with equal or greater force to search results. Abella J. observed at paras. 34 and 36:

[34] The Internet's capacity to disseminate information has been described by this Court as "one of the great innovations of the information age" whose "use should be facilitated rather than discouraged" (*SOCAN*, at para. 40, *per* Binnie J.). Hyperlinks, in particular, are an indispensable part of its operation. As Matthew Collins explains, at para. 5.42:

Hyperlinks are the synapses connecting different parts of the world wide web. Without hyperlinks, the web would be like a library without a catalogue: full of information, but with no sure means of finding it.

(See also Lindsay, at pp. 78-79; Mark Sableman, "Link Law Revisited: Internet Linking Law at Five Years" (2001), 16 *Berkeley Tech. L.J.* 1273, at p. 1276.)

...

[36] The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential "chill" in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.

[102] There are hundreds of millions of active websites over the Internet and trillions of webpages. Search engines make the Internet a viable and effective information and communication resource. The Internet cannot be successfully navigated without search services such as those Google provides. If hyperlinks are the pathways search engines are the maps. Without snippets, which give a sample of the text in which the search terms are imbedded, navigating the Internet would be

much more difficult. Users would have to click on each URL, access the hyperlinked webpage, and examine its contents to determine relevance.

[103] Adoption of the passive instrument test for publication in British Columbia was addressed by Burke J. in *Weaver v. Corcoran*. The plaintiff in that case sued over reader comments posted about him on a forum hosted by the National Post. After referring to *Bunt v. Tilley* and *Metropolitan* as well as *Tamiz v. Google Inc.*, [2013] EWCA Civ 68, Burke J. concluded at para. 282 that the jurisprudence establishes that “some awareness of the nature of the reader post is necessary to meet the test of publication.” She continued at para. 284:

Until awareness occurs, whether by internal review or specific complaints that are brought to the attention of the *National Post* or its columnists, the *National Post* can be considered to be in a passive instrumental role in the dissemination of the reader postings. It has taken no deliberate action amounting to approval or adoption of the contents of the reader posts. Once the offensive comments were brought to the attention of the defendants, however, if immediate action is not taken to deal with these comments, the defendants would be considered publishers as at that date. [Emphasis added.]

[104] In *Weaver* Burke J. found that it was not reasonable to expect the defendant to pre-vet thousands of visitors’ comments for defamatory content and that the defendant did not therefore have the awareness of the words necessary to meet the test of deliberate publication: at paras. 273, 282. That reasoning applies all the more to a search engine that automatically trawls trillions of webpages in seconds.

[105] Added to the sheer volume of material is the obvious difficulty of developing programming to detect and screen out defamatory words. It is apparent that a search engine could not simply be programmed to block every site containing, for example, the words “scam artist” or “steals” without blocking millions of pages of non-defamatory content.

[106] Google programs its search algorithm so that it locates URLs likely to relate to a user’s search query. It is not aware of the snippets and hyperlinks produced, nor can it be, realistically. In the words of Eady J. in *Metropolitan*, Google does not

authorize the appearance of the snippets on the user's screen "in any meaningful sense" but "has merely, by the provision of its search service, played the role of a facilitator": at para. 51.

[107] In summary on this issue, I conclude that Google is a passive instrument and not a publisher of snippets. There is accordingly no issue for trial in relation to defamation.

[108] I emphasize that I have not been asked in this case to consider whether Google could be a publisher of snippets and search results after notice of defamatory content. In the present case, Mr. Niemela initially raised this issue in his notice of application but abandoned the argument when Google voluntarily blocked the URLs that produced the offending snippets. Accordingly, the issue does not arise on the facts of this case.

iv. Injurious Falsehood

[109] The elements of the tort of injurious falsehood are described in *Brown on Defamation*, vol. 9, ch 28 at 28-5 as:

- (1) A false statement disparaging the plaintiff's business, goods or property;
- (2) published to a third person;
- (3) maliciously and without just cause or excuse; and
- (4) resulting in special damages in the form of pecuniary loss.

[110] Publication is an essential element of this tort. I conclude that this cause of action has no prospect of succeeding at trial based on my finding that the production of hyperlinks and snippets in search results does not constitute publication by Google. I therefore dismiss the plaintiff's claim for injurious falsehood.

3. **Google's Application to Strike Portions of the Notice of Civil Claim**

[111] As Google has succeeded in its application for summary judgment, I need not consider its alternative application under Rule 9-5 to strike portions of the plaintiff's notice of civil claim.

4. **Plaintiff's Application to Amend his Notice of Civil Claim**

[112] I have already addressed the plaintiff's application to amend his notice of civil claim to remove the pleading for slander. The balance of the proposed amendments alleges further acts of defamation by Google as a publisher of snippets and search results.

[113] An application to amend a pleading should not be permitted where the proposed amendment fails to state a reasonable cause of action and would fall to be struck on application by the opposing party: *Virk v. Brar*, 2011 BCSC 301 at para. 6.

[114] Since I have concluded that Google is not in law a publisher by virtue of the passive instrument test, the allegations contained in those proposed amendments cannot succeed and the application should therefore be dismissed.

COSTS

[115] In the unique circumstances of this case, and bearing in mind the novel form of publication raised on these applications, I conclude the parties should bear their own costs.

The Honourable Madam Justice L.A. Fenlon