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In Australia, Google has the last laugh - maybe

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A recent decision of Australia's highest court is a major victory for Google, clarifying that it is not liable for facilitating the publication of content created by others, even if given notice of the defamatory nature of the content. From a Canadian point of view, what is interesting is that large portions of this well-reasoned judgment rely on a ruling handed down by the Supreme Court of Canada (SCC).

In [Google LLC v Defteros](#), Australia's highest court set aside a ruling that found Google should be considered a publisher if it links to defamatory material after being put on notice of the defamatory nature of the content. The case involved a Melbourne-based criminal lawyer who "acted for persons who became well-known during Melbourne's 'Gangland Wars'".

The article suggested that he had crossed the line from being a professional lawyer to becoming a confidant and friend of criminal elements.

According to the judgment, the lawyer successfully sued Google for (AUD) \$40,000 after the search engine refused to take down a hyperlink leading to the specific article.

Australian court references Canadian judgment

To explain why the search engine should not be held liable for linking to that article, the Australian court drew heavily on the 2011 SCC decision in [Crookes v Newton](#), delivered by Justice Rosalie Abella and who is referenced throughout the Australian judgment.

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

- [Anti-SLAPP legislation is failing. Here's a possible fix](#)
- [Court ruling a small step in closing Google's 'gateway to harm'](#)
- [Google must do more to combat defamatory online reviews](#)

The Australian court repeatedly returns to *Crookes v Newton*, noting, "Referencing on its own does not involve exerting *control* over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves

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dissemination of the content and suggests control over both the content and whether the content will reach an audience at all, while the latter does not.”

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

Not an absolute win for Google

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

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

The judgment is also important in that it manages to reconcile all of the previous legal decisions in Australia involving Google, Facebook and claims of defamation, on issues not yet considered by Canadian courts. I have addressed some of those in previous posts, including [Australia proves that Google and Facebook can be tamed](#) and [Australia is winning the battle against Google and Facebook](#).

Our courts will find the ruling persuasive

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

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

In Australia and elsewhere, including Canada, attention now will be focused on snippets or the manner in which links to the content of others is described.