

MORE PROTECTION FROM LIABILITY TO WEBSITE OWNERS: SUPREME COURT OF CANADA SAYS REFERENCING A PUBLICATION BY HYPERLINK IS NOT PUBLICATION

The Supreme Court of Canada has just issued a judgment on the increasingly important issue of Internet defamation: *Crookes v. Newton*, 2011 SCC 47. The decision is vital to every person and business that publishes material on the Internet or that operates a website.

The judgment is good news to everyone who uses the Internet, confirming that posting a hyperlink will not make a website owner or author liable for publishing defamatory material found on the hyperlinked website. 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” leading to potential liability.

THE CROOKES FACTS

The plaintiff in *Crookes* is a Vancouver-based businessman and sometime member of the Green Party of Canada. His Green Party ties were the subject of various articles he claimed to be defamatory. In an earlier lawsuit, he sued the

supposed author of those articles. This case arises from a second lawsuit commenced by *Crookes*. In the facts leading to the present decision, the defendant Jon Newton runs a website and published an article on his website. The Newton article referred to the earlier Green Party article, and provided a hyperlink to that article. Newton did not quote the earlier article, or comment on its content.

PUBLICATION VIA HYPERLINK

Almost everyone who plays a role in the writing, publication, or distribution of a defamatory article can be sued and may be found liable in defamation. It is not generally a defence that one is only repeating what another person originally said.

A plaintiff in a defamation lawsuit must prove, among other matters, that the defendant published the defamatory words.

When the offending words are directly placed or quoted in a newspaper or on a website, publication seems obvious. But what if the website does not directly publish the offending words, but instead provides a hyperlink to another website?

The Supreme Court of Canada concluded that a reference to the existence or location of defamatory content by hyperlink, without more, is not publication of that content, and therefore the hyperlinker cannot be found liable.

However, individuals may attract liability for hyperlinking if the manner in which they have referred to content itself conveys defamatory meaning or shows that he or she has adopted the defamatory statement as his or her own. The Supreme Court added that this can occur when the hyperlinker repeats the defamatory content from a secondary source.

The following are hypothetical examples, that may or may not lead to a finding of publication:

Likely publication and potential liability:

- “Click **here** to learn the truth about Mr. Smith’s history of fraud and corruption.”
- “As discussed in more detail in this **article**: “Mr. Smith is fraudulent and corrupt”.”

Unlikely publication:

- “As shown **here**, Mr. Smith’s business practices have been the subject of some (unproven) criticism and litigation.”
- “Some have said that Mr. Smith is corrupt: **hyperlink**”

- “For more information on Mr. Smith’s business practice, we invite you to follow this interesting **hyperlink** to Jane’s blog.”
- “Mr. Smith’s restaurant is one of the best in Vancouver according to this **website**” [website contains link to a defamatory article about Mr. Smith’s business practices]

It should also be noted that, in *Crookes*, one of the hyperlinks was a “shallow” hyperlink, which takes the reader to a webpage where articles are posted. The other was a “deep” hyperlink, which takes the reader directly to an article. Both shallow and deep hyperlinks require the reader to click on the link in order to be taken to the content, and both are captured by the principle set out by the Supreme Court. The case did not, however, deal with what are known as embedded or automatic links, which automatically display the content of another publication when one scrolls over the hyperlink. These types of hyperlinks may not be captured by the same principle, and could potentially render the hyperlinker liable for the contents of the defamatory publication he or she references.

NO PRESUMPTION THAT THE MATERIAL WAS READ WITHIN THE JURISDICTION

The plaintiff must also prove the other aspect of publication: that the offending material was received and read by someone. This proof is fundamental to a claim in defamation.

This proof is also fundamental to the issue of whether it is appropriate to sue in a given jurisdiction. A plaintiff suing in British Columbia must prove that at least one person in British Columbia read the offending material.

In *Crookes*, the Newton article providing the hyperlinks had been accessed a total of

1,788 times. It was not clear whether anyone accessing the Newton article had actually clicked on the hyperlinks to the offending material. Nor was it clear what number of these hits came from independent or repeat visits. Nor was it clear how many hits came from humans or from information-gathering Internet “robot” software. Nor was it clear whether any of the readers were located in British Columbia.

In the circumstances, the Court of Appeal for British Columbia found that the bald fact that there was a certain number of hits on the website article could not prove that anyone had clicked the hyperlink to read the Green Party article via the Newton article. The Supreme Court of Canada did not overturn this finding, and it was expressly endorsed by one of the judges.

Accordingly, the plaintiff had also failed to prove that anyone in British Columbia had read the article, and thus could not show that British Columbia courts had jurisdiction to hear the matter.

RECOMMENDATIONS

Crookes provides useful guidance for Internet participants, and rules out the possibility that publication flows from the simple act of hyperlinking. But *Crookes* also confirms that

each case will turn on its own specific facts, including the wording, tone, and placement of the introduction to the hyperlink, to determine whether the manner in which content is referred to conveys defamatory meaning. A website owner or manager would be wise to seek legal advice before hyperlinking to a potentially defamatory website, or else risk a finding of publication and liability just as if it were the author of the offending material.

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