“Just a click away?: Internet hyperlinks and defamation liability”

By
Marko Vesely and Chris Dafoe

February 16, 2009
This paper first appeared in Canadian Corporate Counsel, Vol 18 No. 3 (Nov/Dec. 2008)

"Practical tips when conducting employee meetings or interviews" by Daniel Wong, May 2008 (Vol. 17, No. 6).

[3] (1996), 133 D.L.R. (4th) 377, [1996] 6 W.W.R. 488, 19 B.C.L.R. (3d) 63 (S.C.).

[4] (2001), 196 D.L.R. (4th) 738, 52 O.R. (3d) 425, 4 C.C.L.T 277 (S.C.J.), revd 215 D.L.R. (4th) 193, 60 O.R. (3d) 665, 162 O.A.C. 186 (C.A.).

[5] [2006] 1 S.C.R. 643, 266 D.L.R. (4th) 257, 80 OR. (3d) 558*n*.

THE DEFAMATION COLUMN

Just a click away?: Internet hyperlinks and defamation liability

Marko Vesely and Chris Dafoe
Lawson Lundell LLP

At first glance, the decision handed down by Mr. Justice Stephen Kelleher on October 27 in *Crookes v. Wikimedia Foundation Inc.*,[1] appears hardly earth-shattering. A mere 35 paragraphs long and issued a few months after a one-day summary trial, the decision resulted in the dismissal of a defamation claim brought by Wayne Crookes, a former Green Party official and owner of a legal services company, against Jon Newton, who operates a website called <www.p2pnet.net>. This was one of several lawsuits filed by Mr. Crookes, naming numerous defendants, after articles critical of his role in the Green Party were published online. It is not the first claim to be struck. Despite this seemingly modest background, within a day of the decision being handed down, it had been posted and commented on at dozens of websites around the world, most of them hailing it as a landmark judgment.

Worldwide interest in the judgment arose from the fact that Kelleher J. dismissed the claim against Mr. Newton and p2pnet on the basis that merely posting a hyperlink to defamatory material, without anything else, does not amount to "publication" so as to give rise to liability for defamation. While the legal consequences of hyperlinking have been considered in many other areas, such as copyright, it appears that this is the first time a court has considered the legal significance of hyperlinking in a defamation case. In the view of many of the commentators, Judge Kelleher might have thrown the World Wide Web into turmoil had he decided otherwise.

It is trite at this point to say that the internet has had a profound effect on defamation law. Thanks to the emergence in the 1990s of the World Wide Web, a user-friendly interface that allows even the technologically challenged to navigate on and publish to the Internet, it is now possible for almost anyone to publish defamatory material around the world.[2] In coming to terms with the impact of this new technology, judges and lawyers have had to wrestle with both legal and practical questions. What is the proper jurisdiction in which to bring a libel suit if publication can be said to have taken place, at least theoretically, in every jurisdiction where the Internet is available?[3] In what circumstances should an Internet service provider be liable for damages? What remedies can a plaintiff realistically hope to achieve against impecunious zealots who spread libel on bulletin boards and blogs from around the world?

What sets the hyperlink question apart from other Internet defamation issues, however, is that it concerns one of the essential building blocks that make the World Wide Web unique. Hyperlinks allow users to navigate from one point in a website to another point in the same website or, increasingly, to another website. In effect, they are the connections that put the "Web" in the World Wide Web. Hyperlinks are also essential to web logging — or blogging — the now widespread practice of posting links to other material and commenting on it, often in a fiercely opinionated and partisan way. Bloggers have become a political force in Canada and the United States, and the practice has become so widespread and pervasive that it is viewed by its practitioners as a virtual world — the blogosphere. Hyperlinks are also essential to web projects such as Wikipedia and its many imitators.

The *Crookes* case has its roots in four articles critical of the plaintiff's role in the Green Party that appeared on two websites, <openpolitics.ca> and <usgovernetics.com>. Crookes commenced separate actions against Nelson and others after they posted links to the articles on those websites. The additional defendants included internet giants such as Yahoo!, Google, Wikipedia, as well as individuals such as Michael Geist, the author of the leading Canadian text on Internet law, who had posted a link to Nelson's site on his blog.

As Mr. Justice Kelleher noted in his reasons, Nelson had no particular interest in the Green Party controversy or in Crookes; his interest in the case lay in its relevance to the question of free speech and the Internet. As Kelleher J. observed at paras. 8-9:

Marko Vesely is a partner with Lawson Lundell LLP in its litigation department in Vancouver and is the head of the firm's Defamation and Media Law Group. He can be reached by phone at (604) 631-9260 or by e-mail at mvesely@lawsonlundell.com. Chris Dafoe is an associate with Lawson Lundell LLP in its litigation department in Vancouver and is a member of the firm's Defamation and Media Law Group. He can be reached by phone at (604) 631-9193 or by e-mail at cdafoe@lawsonlundell.com.

[Nelson] posted a reference to the existence of the lawsuit and its implications for free speech on the internet. There was no comment about Mr. Crookes' character or integrity.

The posting included hyperlinks to articles to which he was referring. He did not quote any of the allegedly defamatory words from openpolitics or usgovernetics. He expressed no view about Mr. Crookes.

The summary trial turned on the issue of whether or not there had been publication, which is an essential element in a defamation claim. Nelson's counsel attacked the claim on two fronts. First, he argued that there was no evidence that anyone had followed the link on Nelson's site. Secondly, he argued that, even if Crookes could demonstrate that someone had clicked on the link, the mere posting of a hyperlink does not amount to publication.

In considering the second issue, Kelleher J. noted that the British Columbia Court of Appeal had recently considered a similar issue in *Carter v. B.C. Federation of Foster Parents Assn.*[4] In that case, however, the defendant had used a printed newsletter to publish the website address (or URL – for uniform resource locator) where the defamatory material could be found. In determining whether that mere reference constituted publication of the website's contents, the court looked at a number of cases that predated the Internet, some by more than 100 years.

In one such case, *Hird v. Wood*,[5] the English Court of Appeal found that a man who stood beside a placard containing defamatory words and drew the attention of passersby to it could be found to have published the words himself. The Court of Appeal found that the facts at bar were distinguishable and were closer to those at issue in the U.S. cases *MacFadden v. Anthony*,[6] and *Klein v. Biben*,[7] in which the New York courts found that a reference in one article to another article containing defamatory material was not a publication of the impugned words.

In *Carter*, the Court of Appeal was alive to the issue of hyperlinks, but declined to rule on it, noting at para. 13 that "[w]hether a different result should obtain concerning an internet website that makes reference to another website I would leave for decision when that factual circumstance arises".

Taking up the challenge, Kelleher J. found that the reasoning of the Court of Appeal in *Carter* applies equally to hyperlinks from one website to another. He compared a hyperlink to a footnote, observing that readers of a newsletter, whether on paper or online, who read of a reference to a third party website, may go to that website. And while he recognized that a hyperlink makes going to that website much easier and faster, ease and speed of access do not, in his view, change the nature of the link/footnote (at paras. 29-30):

The only difference is the ease with which a hyperlink allows the reader, with a simple click of the mouse, to instantly access the additional material.

Although a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content on the originating site. This is especially so as a reader may or may not follow the hyperlinks provided.

He did, however, issue a caution. While merely placing a hyperlink to defamatory material did not amount to publication on the facts before him, the same might not hold true if the hyperlink takes the form of an endorsement or adoption of the defamatory words: "if Mr. Newton had written 'the truth about Wayne Crookes is found *here*' and 'here' is hyperlinked to the specific defamatory words, this might lead to a different conclusion" (at para. 34; emphasis in original).

In that case, it was clear that the hyperlink posted by Nelson contained no such endorsement or adoption of the impugned words. Kelleher J. noted at para. 32 that "[t]he defendant did not reproduce any of the disputed content from the linked articles on p2pnet and did not make any comment on the nature of the linked articles". But that sort of linking is not typical. A more detailed analysis may be required if litigation results from a link that is introduced by words more ambiguous than those in the *Crookes* case or if a poster uses a non-defamatory quotation from the linked article to direct readers to the impugned material.

It should also be noted that Mr. Crookes has appealed summary trial decisions dismissing his claims in related cases: see *Crookes v. Pilling*;[8] and *Crookes v. Holloway*.[9] While Mr. Crookes has not filed an appeal at the time of writing, he has until the end of November to do so.

The decision in *Crookes* will be welcomed by businesses and individuals whose websites contain links to other sites, as most do, or whose contributions to blogs or other websites contain links from time to time. When including hyperlinks on a corporate website, one should bear the following considerations in mind:

- The reference to a link should be neutral in tone and should not contain any endorsement or adoption of any content that one might find at the other end of the link.
- Where possible, and particularly if you are contemplating a link to potentially controversial material, try to avoid reproducing text from the article or web page at the other end of the link. While the *Crookes* decision does not expressly require that one avoid quoting any material from the article being linked to, you may wish to do so out of an abundance of caution in order to bring your firm's website as clearly as possible within the facts that were at issue in *Crookes*.
- You may wish to include a popup window that reminds users when they click on links that they are leaving the firm's website and are accessing content for which the firm is not responsible. *Crookes* does not make such a warning mandatory, but a popup window of this kind would likely reinforce the protections afforded by the decision. The text of the window, which can be designed to disappear after a few seconds, could read as follows:

  Warning!

  You are leaving [name of the firm's website].
  [Name of the firm] is not responsible for any content beyond this point.

- While Kelleher J.'s judgment in *Crookes* reduces concern over liability for defamation, there are other issues beyond defamation to consider when creating hyperlinks. These include copyright infringement and illegal content that might be found on other websites. For these and other reasons, it still pays to exercise caution and prudence when deciding what links to include on a firm website.

[1] 2008 BCSC 1424.

[2] While the terms Internet and World Wide Web are often used interchangeably, the former refers to the dispersed global data communications system that was developed during the Cold War to allow communications to continue after a nuclear attack, while the latter refers to the interface developed in the 1990s that allow for the popular and commercial exploitation of the Internet.

[3] M. Vesely, "Defamation over the Internet: The Difficult Question of Jurisdiction", published in *Cyber Jurisdiction: Sovereign and Personal Dimensions* (Amicus Books, 2007).

[4] (2005), 257 D.L.R. (4th) 133, 42 B.C.L.R. (4th) 1, 2005 BCCA 398.

[5] (1894), 38 S.J. 234 (C.A).

[6] 117 N.Y.S.2d 520 (Sup. Ct. 1952).

[7] 296 N.Y. 638 (Ct. App. 1946).

[8] (2007), 163 A.C.W.S. (3d) 152, 2007 BCCA 515.

[9] (2008), 430 W.A.C. 95 *sub nom. Crookes v. Yahoo! Inc.*, 77 B.C.L.R. (4th), 201, 2008 BCCA 165.

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com