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HARPER GREY LAWYERS BRYAN BAYNHAM, QC AND DANIEL REID QUOTED IN COMMENTARY: SCC DECISION RE: CROOKS V. NEWTON

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The Supreme Court of Canada has held that linking to content online is not "publication" of the linked website. Therefore, users are not liable for defamatory content on sites they link to.

Harper Grey's Dan Reid comments on the significance of the ruling in matters alleging online defamation. Reid and Bryan Baynham, QC were quoted in paragraph 38 of the ruling.

COMMENTARY

To succeed in a defamation action, a plaintiff must prove, on a balance of probabilities, that defamatory words were published (that is, communicated to at least one other person). The plaintiff in Crooks v. Newton, 2011 SCC 47 brought an action suing the defendant for hyperlinking to stories about him. He alleged that the content on the linked pages, which were not authored by the defendant, were defamatory, and that by linking to defamatory content the defendant had "published" the content.

In the decision released today, the Supreme Court of Canada held that hyperlinking to defamatory content is analogous to a reference in the index to a book, and that referencing defamatory material "is fundamentally different from other acts involved in publication" because it does not involve "exerting control over the content" (at paragraph 26.) In light of this distinction, the majority held mere hyperlinking was not legal "publication" for the purpose of libel and defamation law.

In reaching this decision, Abella J. noted that hyperlinks were central to the function of the internet:

[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.

Although the act of hyperlinking by itself was not "publication", the majority affirmed that, in the context of a publication as a whole, a hyperlink itself could still be found to be defamatory:

[40]Where a defendant uses a reference in a manner that *in itself* conveys defamatory meaning about the plaintiff, the plaintiff's ability to vindicate his or her reputation depends on having access to a remedy against that defendant. In this way, individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning; not because they have created a reference, but because, understood in context, they have actually *expressed* something defamatory (Collins, at paras. 7.06 to 7.08 and 8.20 to 8.21). This might be found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source (*Carter*, at para. 12).

In concurring reasons, it was agreed that the hyperlinks in this case did not constitute publication, but preferred a rule whereby a hyperlink would constitute publication if, read contextually, "the text that includes the hyperlink constitutes adoption or endorsement" of the linked content. In reasons concurring in the result, Madam Justice Deschamps suggested a test which would find publication if the defendant deliberately made the defamatory content readily available by hyperlinking.

This ruling is important for advocates of free speech and for those who wish to preserve their reputation. In holding that hyperlinks do not constitute publication, the court recognized the important information-sharing nature of the internet. In doing so, the majority of the court was also careful to affirm that individual reputations are entitled to vigorous protection from defamatory comments:

[37] I do not for a moment wish to minimize the potentially harmful impacts of defamatory speech on the Internet. Nor do I resile from asserting that individuals' reputations are entitled to vigorous protection from defamatory comments. It is clear that "the right to free expression does not confer a licence to ruin reputations" (*Grant*, at para. 58). Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory.

…

[38] New activities on the Internet and the greater potential for anonymity amplify even further the ease with which a reputation can be harmed online:

> The rapid expansion of the Internet coupled with the surging popularity of social networking services like Facebook and Twitter has created a situation where everyone is a potential publisher, including those unfamiliar with defamation law. A reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet.
> (Bryan G. Baynham, Q.C., and Daniel J. Reid, "The Modern-Day Soapbox: Defamation in the Age of the Internet", in *Defamation Law: Materials prepared for the Continuing Legal Education seminar, Defamation law 2010 (2010))*

Dan Reid and Bryan Baynham, QC both have busy defamation law practices. They have particular experience in matters regarding online defamation, and the often give presentations on this topic to industry groups. Readers are welcome to contact either lawyer with any questions regarding this ruling or about defamation, libel and breach of privacy issues.