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Defamation via hyperlinks: More than meets the eye

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Hyperlinks make the World Wide Web go round. They find and connect information and content from a wealth of sources on the web including, from time to time, defamatory material. Newton, the owner and operator of a website in British Columbia, posted an article entitled "Free Speech in Canada". The article itself was not alleged to be defamatory of Crookes, a politician. However, it incorporated hyperlinks to other internet websites that contained defamatory material. Notwithstanding requests from Crookes and his lawyer, Newton refused to remove the hyperlinks. Did Newton's act of hyperlinking to internet websites constitute "publication" of the defamatory material? The Supreme Court of Canada in *Crookes v Newton* [2011] 3 S.C.R. 269 responded with an emphatic "no". Though a correct outcome on the facts, there were three distinct judicial approaches emanating from the court that bear scrutiny.

The first approach was encapsulated in the judgment of the majority delivered by Abella J. which adopted the "bright-line rule" that a hyperlink by itself should *never* be treated as amounting to publication of the linked content. Essentially, what you see is what you get, nothing more (than a mere hyperlink). The learned judge stated that it is "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" (at [42]). This categorical "no publication" rule applies even if the reader follows the hyperlinks and accesses the content. The majority decision is consistent with prior analogous cases, albeit not specifically dealing with defamatory publications via hyperlinks. Several years ago, the British Columbia Court of Appeal in *Carter v BC Federation of Foster Parents Association* (2005) 42 B.C.L.R. (4th) 1 held that the defendants, who had distributed a printed newsletter making reference to a forum on a website that contained a defamatory comment, were not liable as there was no element of "control" by the defendants over the forum and they did not take any active steps to draw attention to the forum (at [13]; see also *MacFadden v Anthony* 117 N.Y.S.2d 520 (1952); *Klein v Biben* 296 N.Y. 638 (1946)).

The traditional rule is that "publication" arises from an act of the defendant which conveyed the defamatory meaning to a third party (*McNichol v Grandy* [1931] S.C.R. 696 at [9]). Here, the majority judges were concerned that the application of the traditional rule would render hyperlinkers presumptively liable for the defamatory material. Contrary to such presumption, Abella J. noted that a hyperlink in itself does not involve "control" over the hyperlinked content, but is merely a reference to "other content" (at [26]–[27] and [29]). That is, hyperlinks communicate the *existence* of information but not the *content* itself (at [30]). Further, the content can be changed at any time by the secondary author beyond the control of the primary author who inserted the hyperlink in the first place (at [27]). Though the primary author may have facilitated the transfer of information, he does not participate in the "*creation or development*" of the content (at [28]). Given the importance of hyperlinks for accessing information on the internet, the imposition of liability on hyperlinkers pursuant to the traditional rule of publication would, in the majority opinion, seriously restrict the flow of information and freedom of expression on the internet (at [30]).

Whilst it is true that a strict imposition of liability on hyperlinkers would seriously restrict freedom of expression on the internet, the reverse rule, that hyperlinks would *never* amount to publication of the hyperlinked information, favours freedom of expression at the expense of reputational interests. Authors of online defamatory materials may be anonymous; in such cases, a person defamed by a hyperlink that connects to defamatory material on a website accessible to many would be hard put to vindicate his reputation. Further, the inflexible majority rule ignores the potentially variegated contexts (e.g. specific textual language) and technological means (e.g. deep or shallow links) through which the hyperlinked content may be conveyed to a third party. The sole criterion of "control" over any subsequent changes in the content, as advocated by the majority, cannot fully accommodate these myriad circumstances. Non-participation in the "*creation or development*" of the content should not automatically negate liability. Depending

on the circumstances, a person who merely repeats the defamatory allegations but does not participate in creating or developing the content may nonetheless be liable.

The rigid "no publication" rule in light of the "control" criterion may also have implications for other aspects of the tort of defamation. If the majority reasoning is extended to other areas of defamation, a defamatory text in which the claimant is only identified in the hyperlinked information would not be one capable of referring to the claimant (but this is contrary to the position in *Islam Expo Ltd v The Spectator (1828) Ltd* [2010] EWHC 2011 (QB) per Tugendhat J.; see [2011] SCC 47 at [104] per Deschamps J.). In other instances, extending the strict majority rule against publication via hyperlinks might actually have the effect of diluting the defendant's free expression on the internet, contrary to that advocated by the majority judges. If the majority judgment were extended, courts would only be entitled to assess defamatory meaning solely from the text without any reference to the hyperlinked content. This will prevent the defendant from referring, for example, to an "antidote" in the linked content that might have the salubrious effect of neutralising the allegedly defamatory text (*Charleston v News Group Newspapers Ltd* [1995] 2 A.C. 65). Another example is where a comment is contained in the text but the factual basis underlying the comment is found within the hyperlinked content. If the strict majority rule is applied to preempt any reference to the factual basis, the defence of fair comment would fail. If so, a rule that was meant to protect defendants in the name of free expression on the internet would, ironically, be utilised to deny a defence that protects the expression of fair comment and/or honest opinions on a matter of public interest via the same medium (*WIC Radio Ltd v Simpson* [2008] 2 S.C.R. 420; *Spiller v Joseph* [2011] 1 A.C. 852).

In contrast to the majority judgment, the second and third judicial approaches suggest there is more (to hyperlinks) than meets the eye. Whilst McLachlin C.J. and Fish J. substantially agreed with the majority judges, they added an important qualification: a hyperlink contained in the text would amount to publication if the text, read contextually, indicates "adoption or endorsement of the content of the hyperlinked text" (at [48] and [50]; *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 at [176]). The defamatory content, if adopted or endorsed, would be treated as incorporated into the text via the hyperlink. What does "adoption or endorsement" mean? First, it must be distinguished from the actual repetition of defamatory allegations. Secondly, the test of "adoption or endorsement" would appear to require something beyond mere control over, or knowledge of, the content in that the text must communicate agreement with the linked content (at [48]; strictly speaking, the word "adoption" does not necessarily import an agreement with the content but seems to indicate that a conscious choice was made to take the content on board). The above test is sufficiently stringent for purposes of publication via hyperlinks when compared to publication by "repetition". After all, it is not necessary to show that a person who publishes by actually repeating defamatory allegations agrees with (or chooses to take on board) the content. The trial judge's hypothetical example, namely the statement that "the truth about Wayne Crookes is found here" and here referred to the hyperlink connected to the defamatory material ([2008] BCSC 1424; [2008] B.C.J. No.2012 (QL) at [34]; [2011] 3 C.L.R. 269 at [70]), usefully illustrates a text that clearly indicates

agreement with the linked content. Here, it may be interpreted from the language of the text (particularly the words "truth" and "here") that Newton had hypothetically *adopted* or *endorsed* the hyperlinked content.

The third approach by Deschamps J. focused on the plaintiff's burden to show that: (i) the defendant had performed a "deliberate" act that rendered the defamatory material "readily available" to a third party in a comprehensible form; and (ii) the third party received and understood the defamatory information. As a reflection of the "bilateral nature of publication" (at [62]), the defendant must not only have communicated the defamatory material, but the third party must have received and understood that defamatory material. The approach is also more holistic and consistent with the entire fabric of a prima facie case of defamation comprising the three elements, namely the existence of defamatory meaning, reference to claimant and publication, all examined from the perspective of the ordinary and reasonable third party (L. Klar, *Tort Law*, 4th edn (Ontario: Thomson Carswell, 2008), at 759).

Admittedly, this third approach based on the two requirements is less direct and certain as compared to the majority rule and even the second approach of McLachlin C.J. and Fish J., but this is partly due to the pragmatic need to adapt to the different modes of communication including hyperlinks. Under requirement (i), the defamatory material will be regarded as "readily available" if it "can be immediately accessed" (at [94]). For instance, an automatic deep hyperlink that allows connection to the content with a mere click must be distinguished from a footnote in a physical book. Whether the hyperlink was user-activated or automatic, shallow or deep, and available to the general public or restricted can make a practical difference for the readers. This readiness to adapt to the means of communication is contrasted with the majority judgment which, though cognisant of the different characteristics of hyperlinks, chose not to address the legal implications of the "inherent and inexorable fluidity of evolving technologies" (at [43]).

The requirement of "deliberate act" under (i) serves as a useful signpost (and indeed, control mechanism) for delineating the scope of "publication" of defamatory materials in cyberspace. Reference was made to the English case of *Godfrey v Demon Internet Ltd (Application to Strike Out)* [2001] Q.B. 201 in which the internet service provider's (ISP's) failure to act despite the plaintiff's request to remove a defamatory posting on its news server, coupled with the ISP's awareness of the defamatory material, constituted publication of the defamatory information (at [88]). In contrast, where the ISP in *Bunt v Tilley* [2006] EWHC 407 (QB); [2007] 1 W.L.R. 1243 or the search engine in *Metropolitan International Schools Ltd v Designtechnica Corp* [2009] EWHC 1765 merely played a "passive instrumental" role, no publication arose (at [89]). There has to be a "knowing involvement in the process of publication" of the allegedly defamatory material (*Bunt v Tilley* at [23]).

On defamation via hyperlinks in particular, primary authors choose to create the hyperlinks in the first place and must be distinguished from mere conduits of information on websites. Yet, this fairly basic choice exercised by the author would be present in most instances of hyperlinking and should not by itself amount to a "deliberate act". On the other hand, the hyperlinker's actual knowledge (as opposed to merely constructive knowledge) of the linked content and the relevant point in

time when he acquired that knowledge may be significant. Control over the hyperlinked content is also important but its absence should not necessarily negate "publication". It is true that the primary author does not possess control over any subsequent changes to the content by the secondary author, a point already highlighted by the majority judges. But this does not necessarily mean he did not "publish" the *original* content. If the primary author had via the text "adopted or endorsed" the hyperlinked content (i.e. the second approach), it is submitted that he should be regarded as having committed a "deliberate act" in publishing the content. In this manner, the second approach may serve as a specific rule within Deschamps J.'s proposed framework.

The existence of a "deliberate act", though necessary, is in itself insufficient for "publication". Courts would also have to examine requirement (ii) for direct evidence and/or inferences that the third party received and understood the defamatory information (*Gaskin v Retail Credit Co* [1965] S.C.R. 297 at 300). Whether the plaintiff can successfully persuade the court to make the requisite inferences would depend on evidence relating to, amongst others, the number of and location of links on the page, the number of hits on the page containing the link, changes made to the linked information and evidence of the behaviour of internet users (at [110]).

Addressing a concern raised earlier by the majority judges, the two-stage approach does not give rise to a legal presumption of publication via hyperlinks (at [100] and [126]). Indeed, and rightly so, there was no publication on the facts. As one of the links was a "shallow" link, and the impugned material was not placed on the site's home page and possessed separate addresses (at [124]), that defamatory material was not "readily available" to the readers. The other link to the defamatory materials on another website was a "deep" link to which the reader could easily gain access with a single click on the link, thus rendering the defamatory materials "readily available" (at [125]). However, there was no direct evidence of the receipt of the linked content by a third party; and no inference that the defamatory materials were received and understood by a third party could (and should) be drawn from the mere number of hits on Newton's article.

The above decision was fairly straightforward in view of the paucity of evidence adduced by the plaintiff, though one can envisage future scenarios where the factors might be more evenly balanced. The requirements under the two-stage approach (in particular, the meaning of "deliberate act") need not be writ in stone but may be further refined in order to adapt to different technologies and novel contexts. As a starting point, "adoption or endorsement" (i.e. the second approach) serves as a useful indicator of "deliberate act" within the two-stage framework. Overall, by placing the burden on the plaintiff to adduce sufficient evidence in order to satisfy the requirements on a balance of probabilities, adequate protection for freedom of expression on the internet is ensured without sacrificing reputational interests entirely. Further, the defence of innocent dissemination could serve as another layer of protection for defendants who were unaware of and did not possess control over the linked content (at [114]), in addition to the existing defences of fair comment (*WIC Radio Ltd v Simpson* [2008] 2 S.C.R. 420) and responsible communication on matters of public interest (*Grant v Torstar Corp* [2009] 3 S.C.R. 640). Finally, unlike the rigid majority rule, Deschamps J.'s approach in

determining "publication", based on the communication of defamatory material to a third party as well as the latter's receipt and comprehension of the defamatory content, would be capable of delivering more rational outcomes consistent with the tort of defamation generally. ☙

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☙ Canada; Defamation; Freedom of expression; Hyperlinks; Publication

