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EXPECT THE BEST

Supreme Court Gives Internet "Posters" New Protection Against Libel Suits

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Suing for defamation on the Internet just got more difficult in Canada.

On October 19, 2011, the Supreme Court of Canada released its long-awaited decision on whether linking to defamatory statements on the Internet constitutes publication for the purposes of a defamation action. With *Crookes v. Newton*, the Court has decided that posting a hyperlink on the Internet does not in itself constitute publication of defamatory material available on another website.

The case is significant, because every plaintiff must prove that the defendant published the defamatory statements at issue to a third party. Now, it is clear that if the defendant posted a link to material elsewhere on the Internet, he or she is not liable in defamation as a publisher of the defamatory statements.

In reaching the decision, the Court stressed the important role of the Internet in supporting the democratic principle of free speech, indicated that use of the Internet to disseminate information "should be facilitated rather than discouraged" and decided that "hyperlinks are an indispensable part of its operation."

This is a major advancement for freedom of expression advocates, authors, and publishers who share information on the Internet that they do not create or control. It's a blow to those wanting to protect their reputations by limiting the exposure of defamatory statements on the Internet, and by going after those individuals who help publicize statements on more obscure websites.

But the binding decision by Justice Abella has to be read in context.

In the case, the plaintiff Wayne Crookes was a Vancouver businessman and campaign manager for the Green Party of British Columbia. Jon Newton, the publisher and author of the website p2pnet.net, published links to articles on a couple of other websites discussing Mr. Crookes. Mr. Crookes felt that these statements were defamatory, and sued Mr. Newton for linking to the defamatory statements, which were a website that Mr. Newton did not control or help create.

It is important to note, however, that in this case Mr. Newton did not actually express his agreement with the statements on the other website. Neither did Mr. Newton repeat any of the statements on his own website. He posted a link, directing his readers to the content on another site. Further, there

was no evidence before the court that a third party actually used the hyperlinks to read the defamatory statements.

In this context, Justice Abella decided that a hyperlink is content neutral, and "by itself, should never be seen as publication of the content to which it refers." With that, Mr. Crookes's defamation action failed.

But what if Mr. Newton had expressed agreement with the statements made on the other website? Or what if Mr. Newton had re-published excerpts from the hyperlinked site?

In additional written reasons, Chief Justice McLachlin suggests that a hyperlinker should be found liable in some circumstances; for example, if the hyperlinker adopts or endorses the content on another website.

In further reasons, Justice Deschamps raised concerns about the ongoing technological advances on the Internet and uncertainty over how this decision could affect future methods of sharing information. She relied on the long-standing innocent dissemination principle to suggest that the Court should focus on how a hyperlink makes information available, and whether anyone actually accessed the information through the hyperlink.

Justice Deschamps' concerns are sure to resonate with lower courts needing to apply the law to future defamation cases. In particular, it will be interesting to see how future courts deal with Internet search engines that create an automatic snapshot of the hyperlinked website.

It will also be interesting to see whether this case increases debate over assumed publication on the Internet. In many jurisdictions, there is a presumption in provincial libel laws that defamatory words in "old" media (newspapers or broadcasts) are published to third parties. While this case is about hyperlinks alone, the Court's analysis does raise questions about whether provincial libel laws should also presume that statements on the Internet are published to third parties.

Nonetheless, the decision makes it clear that the Supreme Court of Canada prefers that defamation litigants go after the original authors/publishers of defamatory statements. It has confirmed that while "a reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet," Canada's highest court also recognizes the "importance of achieving a proper balance between protecting an individual's reputation and the foundational role of freedom of expression in the development of democratic institutions and values." ■