

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

WAYNE CROOKES and WEST COAST TITLE SEARCH LTD.

APPELLANTS
(Appellants)

AND:

JON NEWTON

RESPONDENT
(Respondent)

APPELLANTS' FACTUM
WAYNE CROOKES and WEST COAST TITLE SEARCH LTD., APPELLANTS

Rule 42 of the Rules of the Supreme Court of Canada

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PART I: STATEMENT OF FACTS

1. Wayne Crookes, the individual Appellant (“Crookes”), is a Vancouver businessman and sometime volunteer for the Green Party of Canada. Crookes is the President and sole shareholder of West Coast Title Search Ltd., the corporate Appellant.

Crookes’ Affidavit #1, paras. 1-3 [Appellants’ Record (“AR”), pp. 55-56]

2. Crookes became aware of an internet smear campaign being conducted against him. The principal vehicle for this smear campaign was a website with an url of www.OpenPolitics.ca (referred to as the “OpenPolitics website”). This website was run by a former staffer with the Green Party of Canada, one Michael Pilling. Crookes had been assigned the task of dismissing Mr. Pilling from his employment with the Green Party of Canada in the spring of 2005.

Crookes’ Affidavit #1, paras. 4, 8 [AR, pp. 56, 59-60]

3. Ten articles about Crookes and one referring to the corporate Appellant were posted on this website. They included articles entitled “Wayne Crookes”, “Friends of Crookes”, and “Gang of Crookes”. The defamatory portions of these articles are pleaded in paragraph 51 of the Statement of Claim (AR, pp. 44-48). The articles are reproduced in full at AR, pp. 66-123.

Crookes’ Affidavit #1, paras. 5-6 [AR, pp. 56-59]

4. The ten articles were hyperlinked to each other. A hyperlink is a connection in a web-based article (the “primary article”) whereby a word or phrase is identified within the primary article as having a greater explanation, meaning, or background. When hyperlinked, the reader of the primary article can place the curser on the computer screen over the primary article and “click” the mouse on that word or phrase, bringing up the hyperlinked article from another web based source. The creator of the primary article controls whether there is a hyperlink on any particular word or phrase and the article to which that word or phrase is hyperlinked.

Crookes’ Affidavit #1, para. 7 [AR, p. 59]

5. The Appellants allege that these articles are libelous. When the Appellants were unable to get these articles voluntarily removed from the OpenPolitics website, they commenced legal action in the Supreme Court of British Columbia against those who they believed were the authors and publishers of these articles, including Michael Pilling. This action initially scheduled for trial in October 2008, was adjourned and has not been re-set.

Crookes' Affidavit #1, para. 9 [AR, p. 60]

6. The Respondent Jon Newton describes himself as a journalist. He owns and runs a website with an url of www.p2pnet.net (known as the "P2Pnet website").

Interrogatories: A2 and B2, B4 [AR, pp. 164, 165];
Response to Interrogatories: A2 and B2, B4 [AR, p. 184]

7. The Respondent wrote an article about internet libel entitled "Free Speech in Canada", about a libel suit brought against him personally, and unrelated to the Appellants. The Respondent's article contained the following paragraph (at AR, p. 125):

Under new developments, thanks to the lawsuit, I've just met Michael Pilling who runs OpenPolitics.ca. Based in Toronto, he, too, is being sued for defamation. This time by politician Wayne Crookes.

Crookes' Affidavit #1, Ex. N [AR, pp. 124-126]

8. The Respondent's article "Free Speech in Canada" was freely accessible world wide, on the internet, without restriction. It was also available by an "rss feed", which means that it is automatically and electronically transmitted to subscriber websites. The article is placed on these subscriber webpages so that it can be viewed.

Crookes' Affidavit #1, paras. 11-12 [AR, pp. 60-61]

9. The underscored words Wayne Crookes were hyperlinked to an article entitled "Wayne Crookes" which was published anonymously on a separate website with an url of www.USGovernetics.com (known as the "USGovernetics website")

Crookes' Affidavit #1, para. 14 [AR, p. 61]

10. The Appellants assert that the “Wayne Crookes” article on the USGovernetics website is defamatory. The defamatory words are pleaded in paragraph 8 of the Statement of Claim (at AR, pp. 37-38). The full article is reproduced at AR, pp. 128-130.

11. In the Respondent’s article, the underscored words OpenPolitics.ca were hyperlinked to the OpenPolitics website where all ten articles were posted.

Crookes’ Affidavit #1, para. 14 [AR, p. 61]

12. The Appellants assert that the ten articles posted on the OpenPolitics website are defamatory.

13. The Respondent acknowledged that he created the hyperlinks between Wayne Crookes and the “Wayne Crookes” article on the USGovernetics website, and between OpenPolitics.ca and the Openpolitics website.

Interrogatories: C6, C15 [AR, pp. 166-167];
Response to Interrogatories: C6, C15 [AR, p. 185]

14. On July 18, 2006, Crookes became aware of the article “Free Speech in Canada”.

Crookes’ Affidavit #1, paras. 10, 16 [AR, pp. 60, 61]

15. On August 18, 2006, Crookes wrote to the Respondent asking him to remove the links in his article to both the “Wayne Crookes” article and the OpenPolitics website.

Crookes’ Affidavit #1, para. 28 and Ex. S [AR, pp. 63, 135]

16. Crookes received no response from the Respondent.

Crookes’ Affidavit #1, para. 29 [AR, p. 64]

17. On October 31, 2006, Crookes had his legal counsel write to the Respondent, requesting removal of the hyperlink to the “Wayne Crookes” article.

Crookes’ Affidavit #1, para. 29 and Ex. T [AR, pp. 64, 136-137]

18. In an e-mail exchange which took place on November 9, 2006, the Respondent made it clear that he was not prepared to remove the hyperlinks to either the “Wayne Crookes” article or the OpenPolitics website. He gave no reason for his refusal at the time.

Crookes’ Affidavit #1, para. 30 and Ex. U [AR, pp. 64, 138-140]

19. When asked in Interrogatories why he refused to remove the hyperlink “Free Speech in Canada” from the OpenPolitics website or the “Wayne Crookes” article, the Respondent stated: “I saw no need. It was merely a hyperlink.” When asked why he refused to offer an apology, he re-stated: “I saw no need. It was merely a hyperlink.”

Interrogatories: D 11, D12 [AR, p. 169];
Response to Interrogatories: D 11, D12 [AR, p. 186]

20. USGovernetics eventually removed the “Wayne Crookes” article from its website.

Crookes’ Affidavit #1, para. 32 [AR, p. 64]

21. As of the date of the swearing of Crookes’ Affidavit in support of his application for summary judgment, the article “Free Speech in Canada” remained posted on the P2P website.

Crookes’ Affidavit #1, para. 33 and Ex. W-1 [AR, pp. 64-64, 142]

22. As of the February 1, 2008, “Free Speech in Canada” had been viewed a total of 1,788 times. The Respondent’s response in full to the question of how many times this article had been viewed is:

“At the time of writing (3:19 pm, February 1, 2008), it had been viewed a total of 1,788 times. Whether any of those viewings were by humans as opposed to internet software “robots” and whether any of them clicked on any hyperlink, I do not know.”

Interrogatories: D19, D, 20 [AR, p. 170];
Response to Interrogatories: D19, D20 [AR, p. 187]

23. The Appellants and the Respondent brought cross applications for summary trial and judgment. The Appellants’ application was for summary judgment and assessment of damages;

the Respondent's application was for dismissal of the action.

24. The summary trial was conducted by Mr. Justice Kelleher ("Trial Judge") on August 29, 2008. It was the Respondent's position that his claim was suitable for summary judgment, but that the Appellants' claim was unsuited for summary judgment, because the Respondent also relied on the defences of fair comment and qualified privilege. The Trial Judge did not rule on this issue. It was common ground that the issue which could be adjudicated was whether the Respondent, by hyperlinking to the defamatory articles, had become a publisher of those articles.

25. The Trial Judge held that there had been no publication by the Respondent of the libelous articles. His reasons were two-fold:

- a. there was no direct evidence that anyone had followed the hyperlinks and read the words complained of (para. 20) and that hyperlinking does not lead to a presumption that the person who read the article accessed the hyperlink (para. 24); and
- b. the author of a primary article was not a publisher in law of the defamatory material to which it had hyperlinked (para. 30).

Trial Judgment, paras. 20, 24, 30 [AR, pp. 4-6]

26. On October 27, 2008 the Trial Judge dismissed the Appellants' action against the Respondent for damages for defamation. The Appellants' appealed the order of the Trial Judge to the Court of Appeal for British Columbia.

Formal Order, Kelleher, J. [AR, p. 7]

27. On September 15, 2009 the Court of Appeal dismissed the appeal with a dissenting judgment by Madam Justice Prowse. The facts and a discussion of the general principles are set out in the dissenting judgment. Prowse, J.A. described the issue to be considered as whether the Trial Judge erred in finding that Crookes had failed to prove publication of the impugned hyperlinked articles. Her Ladyship sub-divided the issues as follows:

- a. whether the Trial Judge erred in finding that the creation of a hyperlink in a

website does lead to a presumption of publication of the materials found at the hyperlinked site; and

- b. whether the Trial Judge erred in finding that hyperlinking in these circumstances did not amount to publication by Mr. Newton of the articles found at the hyperlinked site, taking into account all of the evidence.

Court of Appeal Judgment, para. 6 (*per* Prowse J.A.) [AR , pp. 9-10]

28. In response to the Appellants' argument that a presumption of publication of the hyperlinked articles should apply Prowse, J.A. agreed with the Trial Judge that there is no presumption that a reader who accesses an internet source containing hyperlinks also accessed the articles found at the hyperlinked source and held that there was no sound basis for finding a presumption of hyperlinked articles in this case.

Court of Appeal Judgment, para. 42 (*per* Prowse J.A.) [AR, p. 19]

29. Prowse, J.A. considered the question of whether placing a hyperlink on an internet document can amount to publication and noted that the Trial Judge did not make a negative finding in this regard but, rather, restricted himself to the facts of this case and found in the circumstances the use of the hyperlink did not amount to a publication of the hyperlinked articles.

Court of Appeal Judgment, para. 45 (*per* Prowse J.A.) [AR, p. 19]

30. Prowse, J.A. noted that any user who went to the Respondent's site could readily access the impugned articles by simply clicking on the hyperlinks in that site. She also noted:

[48] It is a significant feature of hyperlinking that the author of the original article makes a considered choice to hyperlink to another website or web article.... One would have thought that an author who creates such a hyperlink has some idea of what is contained on the linked site, and considers it relevant to the main article; otherwise why create the link? Here, however, Mr. Newton deposed that he had not read the hyperlinked articles prior to linking them to his article. In any case, the fact remains that it is this feature of choice in creating the hyperlink which distinguishes Mr. Newton's linkage to the Wayne Crookes article and the openpolitics site from the linkage provided, for example, by ISPs when they are acting as a mere conduit of information found on their sites (who have

been found in many cases not to be liable as publishers).

Court of Appeal Judgment, para. 48 (*per* Prowse J.A. [AR, pp. 20-21])

31. While Prowse, J.A. agreed with the Trial Judge and the reasoning of the Court of Appeal in *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398 that hyperlinking did not amount to publication of the hyperlinked articles, she noted that the footnote analogy was not a complete answer to the question of whether a hyperlink constituted publication as a number of other factors must be taken into account.

Court of Appeal Judgment, paras. 58-60 (*per* Prowse J.A.) [AR, p. 24]

32. While Prowse, J.A. agreed with the Trial Judge that there was no direct evidence of publication to a third party, she concluded that the Trial Judge erred in failing to consider all of the evidence in determining whether an inference of publication could be drawn in these circumstances (para. 70). Prowse, J.A. did not accept that “the hyperlinks, when viewed in the context of the Respondent’s article as a whole, operated as a “mere” bibliographical” [sic] footnote” (para. 71). Her Ladyship concluded that, on all the evidence, the Appellants had established publication of the hyperlinked articles to at least one third party (para. 72).

Court of Appeal Judgment, paras. 70-72 (*per* Prowse J.A.) [AR, pp. 26-27]

33. The majority judgment, authored by Madam Justice Saunders and concurred in by Mr. Justice Bauman, also concluded that there was no basis for finding a presumption of publication of the hyperlinked articles. However, the majority did not agree that the Trial Judge erred in failing to infer publication to at least one party. The majority did not agree that the article “served as words of encouragement, or an invitation”, to a person accessing the Respondent’s site.

Court of Appeal Judgment, paras. 78-79 (*per* Saunders J.A.) [AR, p. 28]

34. Saunders, J.A., for the majority stated that the dissenting judgment of Prowse, J.A., mixed two distinct issues related to the law of defamation, the promulgation of the impugned item and the receipt of that item by a person within the court’s jurisdiction, as one.

Court of Appeal Judgment, para. 80 (*per* Saunders, J.A.) [AR, pp. 28-29]

35. In considering the judgment in *Carter, supra*, the majority found that there was no “substantial difference between providing a web address and a mere hyperlink” as both require the reader to take a distinct action due to the barrier between the accessed article and the hyperlinked site that must be bridged by the reader rather than the publisher.

Court of Appeal Judgment, para. 82 (*per* Saunders, J.A.) [AR, p. 29]

36. While the majority agreed that in certain circumstances a hyperlink may serve as an invitation or encouragement to view the impugned site, Saunders, J.A. nonetheless agreed with the Trial Judge and held that in the context of the hyperlinks in this case there was no “statement of approbation, or adoption, and appear to me to be most comparable to a footnote for a reader, or a card index in a library.” On this basis she concluded that the hyperlinks did not constitute publication.

Court of Appeal Judgment, paras. 86, 89-90 (*per* Saunders, J.A.)
[AR, pp. 30-31]

37. With respect to the question as to whether it could be inferred a person accessed the impugned articles by way of a hyperlink the majority determined there was an insufficient basis upon which to make such an inference. The appeal was dismissed.

Court of Appeal Judgment, paras. 91-92 (*per* Saunders, J.A.) [AR, pp. 31];
Formal Order, Court of Appeal for British Columbia [AR, p. 32]

38. The Appellant sought and was granted leave to appeal to this Honourable Court.

Order granting Leave to Appeal (*per* McLachlin C.J.C., Abella and
Rothstein, JJ.) [AR, p. 54]

PART II: QUESTIONS IN ISSUE

39. Can the author of a website article, through the deliberate insertion of a hyperlink in the article which links to a defamatory website article, be presumed to have published the defamatory article?

40. If the author cannot be presumed to have published the hyperlinked article, under what circumstances can it be inferred that the author has published this defamatory article?

PART III: ARGUMENT

A. INTRODUCTION

41. As the internet has entered the mainstream of social discourse the consequences of internet communication pose significant challenges for the legal system. Recent decisions of this Court recognize that both current statutory law and common law may require re-conceptualization in light of the advent of contemporary social and technological developments and, where necessary, existing legal régimes should be adapted to take into account the changed environment in which social discourse now takes place. This Court has clearly stated that there will be no blanket exception or immunity from damages for harmful conduct because the alleged harm has arisen from the use of new forms of communications technology.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45 (“SOCAN”)[Book of Authorities (“BA”), tab 12]

Grant v. Torstar Corporation, 2009 SCC 61 (“Grant”) [BA, tab 7]

Quan v. Cusson, 2009 SCC 62 (“Quan”) [BA, tab 11]

42. In *Grant* and *Quan* this Court revisited the common law tort of defamation and considered whether the existing law struck an appropriate balance between two values vital to Canadian society: freedom of expression and the protection of individuals’ reputations. The judgment in *Grant*, in particular, is a substantial reappraisal of the common law tort of defamation undertaken to assess the existing laws’ consistency with evolving societal developments. This Court concluded that the common law should be modified to recognize a defense of responsible communication on matters of public interest as a means of balancing these fundamental values. For this balancing to be meaningful the assessment of what conduct will meet the standard of responsible communication must be responsive to the context in which the communication occurs.

43. In *Grant*, the Court’s analysis of the common law tort of defamation was undertaken through the prism of “Charter values” and, in particular, the values which inhere in Charter protection for freedom of expression. Notwithstanding the importance of those Charter values,

the Court held that protection of reputation remains an important consideration in the tort of defamation and that Charter principles do not provide a license to damage another person's reputation simply to fulfill one's desire to express oneself.

Grant, supra, at para. 51 [BA, tab 7]

44. The Court also recognized that the advent of the internet has facilitated expression and communication on an unprecedented scale and as a result the potential for and ease with which a person's reputation may be damaged has exponentially grown. In recognizing the defence of responsible communication on matters of public interest, the Court recognized that the enhanced ability and ease with which persons can now communicate and reach a potentially world-wide audience comes with a corresponding standard of responsibility.

[53] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. ...

[62] ... The press and others engaged in public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defence based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. ... The requirement that a publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. ...

Grant, supra, at paras. 53, 62 [BA, tab 7]

45. A similar standard of responsibility underlies the English "Reynolds privilege" or defence of responsible journalism. The privilege is available to persons who have acted responsibly in publishing the material, including material of public interest published in any medium. The maintenance of that standard is in the public interest and in the interests of those whose reputations are involved.

Jameel v. Wall Street Journal Europe SPRL, [2007] 1 A.C. 359, [2006] UKHL 44, at paras. 53-54 (*per* Lord Hoffmann), 134-135 (*per* Lord Scott), 149 (*per* Baroness Hale) [BA, tab 9]

B. THE NATURE OF HYPERLINKS

46. As noted above, a hyperlink is a connection in a web based article (the “primary article”) whereby a word or phrase is identified within the article as having a greater explanation, meaning or background. It is usually identified by the presence of underlining or italicizing a word or words in the primary article. Sometimes it is identified by the use of a different colour on the computer screen. The identification of the hyperlink allows the reader of the primary article to place the cursor over the primary article and “click” the mouse on that word or phrase bringing up the article (the “hyperlinked article”) from a second website, another webpage on the same website, or another part of the same article on the same webpage. The creator and subsequent editors of the primary article control whether there is a hyperlink to a webpage on another website.

Crookes’ Affidavit #1, para. 7 [A.R., p. 59]

47. The decision of the Court of Appeal for British Columbia in the case at bar fails to give proper contextual consideration to the role of hyperlinks on the internet. The creation of a hyperlink is one means by which defamatory material can be spread. Failure to recognize that an act of “publication” occurs by the expedient of using a hyperlink drastically undermines the notion of responsible communication on the internet.

48. The decision under appeal holds that the inclusion of a “hyperlink” to allegedly defamatory material on an internet website cannot, standing alone, be presumed, or inferred, to be publication as that term is understood in the current law of defamation. This conclusion sets a higher standard than the current law of publication in defamation law. It also significantly devalues an individual’s ability to protect and vindicate his or her reputation in the context of a rapidly developing technology that is more ubiquitous than traditional forms of media. Through the internet and the considered use of hyperlinks, harm to reputation can be achieved electronically with the speed of a few key strokes.

49. This is the first occasion upon which this Honourable Court has been called to consider the nature and effect of the inclusion of a hyperlink on an internet website. However, judgments from this Court, and certain judgments from other jurisdictions are helpful.

50. In *SOCAN* this Court distinguished, for the purposes of the application of the *Copyright Act*, R.S.C. 1985, c. C-42 between those who are mere “intermediaries” that make telecommunications over the internet possible and those who actively engage in acts that relate to the content of a communication. In Canada, an Internet Service Provider (“ISP”) who confines its role to that of intermediary is distinguished from an ISP who may act as a content provider or create embedded links which automatically precipitate a telecommunication of copyrighted music from another source. In the latter instances, copyright liability may attach to the added functions.

SOCAN, supra, at para. 102 [BA, tab 12]

51. In the English decision *Godfrey v. Demon Internet Ltd.* defamatory material was published by an ISP, Demon Internet. When the plaintiff discovered this material, he requested that it be removed. Demon Internet agreed, but then failed to remove it. The court held that the ISP was responsible for having published the defamatory comments and that damages arose because there was no sustainable defence of innocent dissemination after the material was brought to Demon’s attention. Demon’s inaction was enough activity to attract liability.

Godfrey v. Demon Internet Ltd., [1999] 4 All E.R. 342 (Q.B.) [BA, tab 6]

52. Similarly, in *Bunt v. Tilley* three defendant ISPs posted defamatory messages on websites operated by three other defendant ISPs. The three defendant ISPs applied to have the action against them dismissed. They were successful. Eady J. based his decision on the passive role of the ISPs and, in his analysis, considered the degree of knowledge of the ISP as an important factor. He commented (at para. 21):

[21] If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue.

Bunt v. Tilley, [2007] 1 W.L.R. 1243, [2006] EWHC 407 (Q.B.) [BA, tab 2]

53. In France, the Tribunal de Grande Instance de Paris in *Monsieur Oliver M. v. SARL Bloobox Net* held that an internet site had breached the privacy of the plaintiff by hyper-linking to another website with pictures and articles about his love life. The Tribunal held that the inclusion of the hyperlink was a deliberate decision of the defendant and, as a result, the defendant was responsible for the content of the hyperlinked article.

Monsieur Oliver M. v. SARL Bloobox Net, No R., G. 08/52543,
(March 26, 2008) [BA tab 10]

54. The Tribunal's decision was overturned by the Cour d'appel de Paris in *Bloobox Net/Olivier M.* The Court ruled that, since there had been no prior request by the plaintiff to have the hyperlink removed from the site, the legislation referred to as "Loi 2004-575 du juin 2004" applied. This statute required the owner of the website (hébergeur) to refuse the plaintiff's request to remove the hyperlink prior to establishing the website's liability.

Bloobox Net/Olivier M. (November 21, 2008) Cour d'appel de Paris 14
ème chamber, section B, NO RG 08/07801 [BA, tab 1]

55. The foregoing cases emphasize that liability does not arise from passive involvement with defamatory material but from having assumed an active role with regard to it. The creation of a hyperlink is precisely the type of active role which should lead to an inference of publication and consequent liability.

56. The legal treatment of a hyperlink must reflect its use and purpose on the internet. The very reason for the existence of a hyperlink is not only to draw a third party's attention to, but also to provide easy access to, the material connected by a hyperlink. The creation of a hyperlink is a considered and active choice by the creator of the hyperlink. The creation of a hyperlink is a considered decision by its creator in order to identify for readers the material connected by the hyperlink as being worthy of being hyperlinked. In that sense, it is different from other words on the website which are not hyperlinked. It is an active choice in that effort is expended to create the hyperlink. It is a logical inference arising from the activity associated with the creation of the hyperlink that the creator of the hyperlink has knowledge of the content

of the linked site. Further, given that the creation of a hyperlink facilitates access to the material, it is a logical inference that the creator of the hyperlink has knowledge of the material which is accessed by the hyperlink.

C. PRESUMPTION OF PUBLICATION

57. The existing common law was developed in the context of print and electronic media which deliver a fixed message usually to a fixed geographic area by relatively few publishers. This law currently supports the proposition that a presumptive case of publication arises if the plaintiff proves facts “from which it can reasonably be inferred that the words were brought to the knowledge of some third person...” In *Gaskin*, this Court adopted the general principle stated in *Gatley on Libel and Slander* to the effect:

It is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person. If he proves facts from which it can reasonably be inferred that the words were brought to the knowledge of some third person, he will establish a *prima facie* case.

Gaskin v. Retail Credit Co, [1965] S.C.R. 297 at p. 300 (“*Gaskin*”)
[BA, tab 5]

58. In the instant case, the Court of Appeal for British Columbia was unanimous in holding that there was no basis for finding a presumption of publication based upon the inclusion of a hyperlink on the relevant websites. In so doing, the Court agreed with the Trial Judge who had found that “without proof that persons other than the Plaintiff visited the Defendant’s website, clicked on the hyperlinks, and read the articles complained of, there cannot be a finding of publication...” (Trial Judgment, para. 20). The Trial Judge concluded that:

[24] In my view, the mere creation of a hyperlink in a website does not lead to a presumption that persons read the contents of the website and used the hyperlink to access the defamatory words.

Trial Judgment, paras. 20, 24 [AR, pp. 4, 5]

59. When this endorsement of the Trial Judge's conclusion is taken together with the Court of Appeal judgments, the essence of the decisions on whether a hyperlink creates a presumption of publication is found in the Court of Appeal finding that: "...there is no presumption that a reader who accesses an internet source containing hyperlinks also accesses the articles found at the hyperlinked source..." (para. 42) and the Court's conclusion that neither a presumption nor inference of publication could extend to the issue of the jurisdiction where an internet reader might reside.

Court of Appeal Judgment, paras. 41, 42 and 78 [AR, p. 18-19, 28];
Trial Judgment, para. 24 [AR, p. 5]

60. The judgments of the Court below and, in particular, the conclusion that there is no presumption of publication related to an internet site containing hyperlinks are not consistent with the applicable law governing the establishment of the presumption of publication. The Trial Judge and the Court of Appeal imposed too onerous a standard on the Appellants by requiring "proof that persons other than the plaintiff visited the defendant's website, clicked on the hyperlinks, and read the articles complained of" (Trial Judgment, para. 20 at AR, p. 4). The Appellants are not required to prove that the words complained of were brought to the actual knowledge of some third person. A presumptive case is established if there are facts from which it can be reasonably inferred that the words were brought to the knowledge of some third person. The presumption of publication cannot be bifurcated. It extends to all elements of publication.

61. The Court of Appeal's conclusion on this point is not only inconsistent with the current law in Canada, it is also not sensitive to the role of hyperlinks on the internet. A hyperlink is a part of the content of the primary article. Like the rest of the content of the primary article, it is part of what the primary article has chosen to communicate. The hyperlink gives immediate access to the hyperlinked article and it is these elements of deliberateness, immediacy and facilitation of access that properly characterize the information accessed by the hyperlink as part of the primary article. A hyperlink incorporates the material contained on the hyperlinked site as part of the meaning communicated on the primary article. If the actual content of the hyperlinked site was reproduced on the primary website within the primary article, there could be no dispute that it was thereby published by the primary website. A hyperlink is merely a way

to bypass putting the original material onto the primary article, in essence telling the reader: “you can get it here”.

62. Given the purpose and nature of a hyperlink, a presumptive case of publication is established in the present circumstances. It can be reasonably inferred that embedding a hyperlink in the primary article brings the contents of the hyperlinked material to the knowledge of a third person. The creation of a hyperlink does not simply make access to the hyperlinked material available; hyperlinking is a form of communication in the same way as any other content on the primary site. It is more than a mere reference, it is an inclusion. As such, it poses the same potential for damage to reputation as if the words on the hyperlinked site were actually reproduced on the primary site within the primary article.

63. If a hyperlink does not give rise to a presumption of publication, and protection against defamation on the internet is limited to a single, primary site, then there is the potential for defamatory words to be hyperlinked myriad times with no prospect of those creating the hyperlink having any responsibility for any resultant injury to reputation. The failure to recognize that a hyperlink is part of the communicative content on the site on which it appears absolves those who create a hyperlink of any need to be responsible for what is on their website. The prospect of liability is simply avoided by providing one or more hyperlinks and turning a blind eye to the content of the hyperlinked material.

64. This is neither a workable nor fair outcome which balances freedom of expression with potential harm to reputation related to internet journalism.

D. INFERENCE OF PUBLICATION

65. The majority judgment in the Court of Appeal upheld the Trial Judge’s finding that no inference of publication arises by the inclusion of a hyperlink. In so finding, the Court relied upon its previous judgment in *Carter v. B.C. Federation of Foster Parents Association* (“*Carter*”).

Carter v. B.C. Federation of Foster Parents Association (2005),
42 B.C.L.R. (4th) 1, 2005 BCCA 398 (“*Carter*”) [BA, tab 3]

66. In *Carter* the plaintiff alleged that the defendant was responsible for republishing defamatory comments on a website forum when it disseminated a hard copy newsletter which contained a reference to the internet address of the website forum. The trial judge had held that the defendant ought not to be found liable. The trial judge considered existing lines of authority with respect to publication in which the common elements were that “...the defendant had knowledge of the defamatory words and it lay within his power to remove the offending words and he failed to do so or he directed others to the words.” The plaintiff had argued that merely informing others in the context of a newsletter that made reference to the website without “reference or knowledge of its contents” constituted publication. The trial judge found the situation analogous to those magazine cases in which the simple mention of an article without repetition of the article or of the defamatory material was held not to be publication.

Carter, supra, para. 9 (quoting from paras. 51-59 of the trial decision)
[BA tab 3]

67. In *Carter*, the Court of Appeal agreed with the trial judge’s analysis in that case that the factual situation was closer to the magazine cases and distinguishable from the English authority *Hird v. Wood* (“*Hird*”). In *Hird*, the English Court of Appeal held that the fact that the defendant took up a position near to a placard upon which defamatory words were written and drew the attention of passers-by to the placard by pointing to the placard was evidence of publication sufficient to be left to a jury. Notwithstanding that there was no evidence as to who wrote the words on the placard or who erected it the Court found that the determining factor on with respect to the issue of publication was the taking of active steps to draw attention to the material to passers-by.

Hird v. Wood (1894), 38 S.J. 234 (Eng. C.A.) [BA, tab 8]

68. In reaching its decision with respect to which line of authorities applied the Court of Appeal in *Carter* commented as follows (at para. 13; italicized emphasis added):

[13] Unlike the situation found in the *Tacket* case, there was here no element of control by the Federation over the Bopeep Forum and the facts of the instant case are quite distinguishable from the situation found to exist in the *Hird* case. In *Hird*, the defendant took active steps to draw the attention of persons to the

defamatory placard. I should say that the defendant there was taking active steps to publish to the world the defamatory material contained on the placard. I do not believe the circumstances extant there can be successfully analogized to the instant case. I take note of the fact that this was a reference *in a printed newsletter to a website and I would limit the effect of this case to that factual situation*. Whether 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....

Carter, supra, at para. 13 [BA, tab 3]

69. In the case at bar the majority in the Court of Appeal acknowledged the difference in the circumstances in *Carter* yet found that there was no substantial difference between providing a web address and a hyperlink on a website: in each instance a decision was required on the part of the reader to access another website and to take a distinct action to do so. The majority held that in both cases, there was a barrier to be bridged, not by the publisher, but by the reader and noted that it could not be assumed that access from a mere web address mentioned in an article will require any more effort than from a hyperlink.

Court of Appeal Judgment, paras. 81-82 [AR, p. 29]

70. These observations form the basis for the Court of Appeal's conclusion that the reasoning in *Carter* supported the Respondent's argument that the mere fact of creating a hyperlink did not constitute publication of the material on the hyperlinked site. While the majority noted that the essence of following a hyperlink was to leave one website and enter a different and independent website the majority failed to appreciate the essential nature of a hyperlink included in an article. The creation of a hyperlink does signify more than a "mere mention"; it is the internet equivalent of "pointing to a placard" and as such constitutes publication.

71. The majority judgment erred in assessing the context of hyperlinks too narrowly and, in particular, erred in finding that the actions of the Respondent were properly characterized as merely referencing rather than taking active steps to draw attention to the defamatory material. The majority found that there was no encouragement or invitation from the fact that the discussion in the primary article concerned free speech and defamation which "...fall far short of

a statement of approbation, or adoption, and appear to me to be most comparable to a footnote for a reader or a card index in a library” (para. 89).

Court of Appeal Judgment, para. 87-89 (*per* Saunders, J.A.) [AR, p. 30]

72. There are two errors in the reasoning which caused the majority to conclude that the Respondent’s actions constituted a mere mention. First, publication does not require a statement of approbation or adoption. Publication requires only that the defamatory words be brought to the attention of a third party. Therefore, the fact that the discussion in the article fell short of a statement of approbation or adoption is irrelevant to an assessment of whether the Respondent’s conduct constituted active steps.

73. Second, the characterization of a hyperlink as being comparable to a footnote for a reader of written material, or a card index in a library is not an apt analogy. It is not sensitive to the interactive nature of the internet and how information is obtained through the internet. The characterization of a hyperlink as comparable to a footnote ignores the immediacy of a hyperlink. A footnote or other reference in printed material to material found elsewhere (such as a reference in a newsletter to a website) refers to material completely external to the primary material and requires the potential reader to seek out the referred to source. The creation of a hyperlink actually embeds the referred to material in the primary article. The creation of a hyperlink is intended to facilitate interaction and access to information that, absent such technology, might otherwise be included in the primary material. The utilization of a hyperlink, *if* it is analogous at all to the footnote in written material or a card index in a library, would be analogous only if the material accessed by the hyperlink were stapled to the written material or card index.

74. When the nature and context of hyperlinks are considered, the inclusion of the hyperlink in the material published by the Respondent is a considered active step that brings the Respondent’s conduct within the principles expressed in the placard case of *Hird* rather than the magazine cases.

75. Furthermore, the circumstances of the case at bar are not analogous to the magazine cases. This case involves one internet article embedding a hyperlink to another internet article. This context invites a different analysis and result from that in either the magazine cases or *Carter*. In the present case the barrier to accessing the defamatory comment is attenuated. All that is required is a keystroke. More importantly the author, by creating a hyperlink, goes further than merely mentioning another article that contains defamatory comments. The creator of a hyperlink deliberately embeds the hyperlink in the primary article thereby signaling that the link is not peripheral or adjunct to the article but is intentionally incorporated into the article. The intent is to include the material without the necessity of reproducing the material. This distinguishes the present case from *Carter* and the magazine cases upon which the trial judge and the Court of Appeal relied. The creator of the hyperlink is willfully directing others to defamatory statements and on the principles set out in the placard case of *Hird*, the creation of the hyperlink constitutes publication.

76. Finally, with regard to the decision in *Carter*, it appears clear that the majority judgment of the Court of Appeal at the case at bar misapprehended the facts in *Carter*. It is clear from the Court's finding at paragraph 82 of the majority judgment that the Court saw no substantial difference between providing a web address and a mere hyperlink because "both require a decision on the part of the reader to access another website" (emphasis added). The majority obviously concluded that *Carter* involved moving from one website to another website by typing in a web address to move to the next site as opposed to accessing that site through a hyperlink. This is not, with respect, an accurate description of the facts in *Carter*.

Court of Appeal Judgment, para. 82 (*per* Saunders, J.A.) [AR, p. 29]

77. On the issue of an inference of publication from the evidence, Prowse, J.A. in dissent held that the Trial Judge erred in failing to draw an inference, on all of the evidence, that the hyperlinked articles had been published by the Respondent. She relied upon the number of times the article on the website had been viewed and concluded, it was inherently unlikely that not one of the readers would have chosen to access and read the impugned articles contained at the hyperlink. Furthermore, she held that the other words on the website would have served as

words of encouragement or an invitation, to a reader to look further by accessing the hyperlinks. Prowse, J.A. rejected the notion that the hyperlinks, when viewed in the context of the material on the website as a whole, operated as a mere biographical footnote.

Court of Appeal Judgment, paras. 70-71 (*per* Prowse J.A.)
[AR, pp. 26-27]

78. The reasoning of Prowse, J.A.'s dissenting judgment ought to be preferred. The approach taken to the inference of publication in the majority judgment in the Court of Appeal is not sensitive to either the communicative function served by a hyperlink, or to the considered and active role undertaken by the creator of the hyperlink. Further, in a case where both Plaintiff and Defendant reside in the same jurisdiction the inference of where the impugned material is read is easily drawn. If the law of defamation is to continue to protect the reputation of individuals, it must be more sensitive and responsive to the nature of the internet. As noted by the concurring judgment of Gaudron, J. in *Dow Jones and Company Inc. v. Gutnick*:

[92] ... The genius of the common law derives from its capacity to adopt the principles of past decisions by an analogical reasoning to the resolution of entirely new and unforeseen problems. When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for...

Dow Jones and Company Inc. v. Gutnick (2002), 210 C.L.R. 575, [2002]
HCA 56 (Aust. H.C.) at para. 92 [BA, tab 4]

E. CONCLUSION

79. The Appellants submit that the Court of Appeal for British Columbia erred in concluding that in the circumstances of the case at bar the creation of a hyperlink did not raise either a presumption or an inference of publication. If the creation of a hyperlink neither raises a presumption nor an inference of publication then protection against cyber defamation will be limited to the primary site regardless of the number of times the information is hyperlinked. Such an approach absolves those who intentionally create the hyperlink of any need to be responsible and risks making the law of defamation irrelevant for internet communication.

PART IV: SUBMISSIONS AS TO COSTS

80. The Appellants request that costs be awarded to the Appellants in this Court and in the Courts below.

PART V: ORDER SOUGHT

81. The Appellants seek an order setting aside the judgment of the Court of Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated in the City of Vancouver this 20th day of July, 2010.

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Co-Counsel for the Appellants Wayne Crookes
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PART VI: TABLE OF AUTHORITIES

Paragraph

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PART VII: ENACTMENTS RELIED ON

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