Case report: Crookes v. Wikimedia Foundation Inc.

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In 'Crookes v. Wikimedia Foundation Inc.,' the Supreme Court of British Columbia decides that the mere creation of a hyperlink to defamatory words does not constitute as publication of those words and the creator of that hyperlink is not liable for the defamatory contents of the linked site.

In the recent years, blogging has become popular. There are blogs on a wide variety of topics including video game law (www.videogamelawblog.com).

Bloggers create their own websites or online forums, and often invite readers to add comments or replies to blog postings. Often, these postings include hyperlinks to other websites. To the extent that these hyperlinks connect to defamatory material, can the creator of the hyperlink be held liable for defamation? This was the issue that was addressed in the case of Crookes v. Wikimedia Foundation Inc.

The action in defamation was dismissed by the Supreme Court of British Columbia on the basis that the creation of a hyperlink does not constitute as publication of the contents of the linked site. Publication is an essential element to the tort of defamation, so the lawsuit could not succeed.

Background

The plaintiffs had commenced five separate actions seeking damages for defamation against various individuals and organizations, including Yahoo!, Wikipedia and Google. The plaintiffs alleged that they had been defamed in four articles that were posted on the Internet. Three of the articles were posted on the website www.openpolitics.ca ("openpolitics") and the fourth article was posted on www.usgovernetics.com ("usgovernetics").

The defendant operated the website www.p2pnet.net ("p2pnet"). This website contained commentaries and news articles on issues about the Internet and associated technologies.

After the first of the five actions by the plaintiffs was commenced, the defendant published an article on his website commenting "on the implications of defamation actions for those who operate internet forums". This posting included hyperlinks to the four articles containing the allegedly defamatory words. The defendant did not quote any of the allegedly defamatory words from the articles, nor did he express any view about the plaintiffs in his posting. Further, the defendant was not involved in any way with either the openpolitics website or the usgovernetics website. The defendant cited his interest in free speech and in the Internet as the reason for creating the posting.

The plaintiffs did not allege that the defendant wrote or posted any defamatory words. Rather, the plaintiffs took the position that the mere posting of a hyperlink to a remote site containing defamatory words constitutes as publication of those words on the originating site.

Decision

The Court decided in favour of the defendant, holding that the mere creation of a hyperlink to defamatory words does not constitute as publication of those words. The Court also held that the fact that online materials are freely and easily accessible does not warrant the application of a presumption of publication of those online materials.

No Presumption of Publication

In Canada, the tort of defamation requires proof of publication. Publication means that the defamatory words must have been communicated to at least one person other than to the person who is the subject of the defamatory words.

The first hurdle faced by the plaintiffs was to show that the posting on the p2pnet website was published. The Court had to decide whether the plaintiffs had the onus of adducing evidence that the posting had been viewed by anyone who then followed the hyperlinks and read the material on the openpolitics website or the usgovernetics website, or whether publication could be presumed.

The plaintiffs argued that publication should be presumed because the posting was online and freely accessible. The premise of the plaintiff's argument was based on the principle that was previously enunciated in another Canadian case that "publication is presumed where statements are made in books or newspapers or where they are broadcast to the general public." The inference is that because the p2pnet website is freely and easily accessible, the posting on the website was broadcast to the public and therefore publication established.

In response to the above argument, the Court considered the companion case of Crookes v. Holloway. The Holloway case involved the same plaintiff, who commenced an action in defamation alleging that defamatory material was posted on a website with restricted access. The action was dismissed because there was no proof of publication. The Court in Holloway stated that 'publication is an essential element for an action in defamation.' In order to prove defamation, the plaintiff must show evidence that the defamatory materials had been communicated to a third person. The Court of Appeal reaffirmed the trial judge's decision in the Holloway case, holding that the mere fact that a statement was posted on a website with restricted access does not support the presumption that the statements were read by anyone.

The Court in the present case recognized that the facts before it were potentially distinguishable from those in the Holloway case because the p2pnet website did not restrict user access, but rather, was freely accessible. However, the Court in the present case found that distinction to be irrelevant, stating that "the issue in this case is not how accessible the website is, but rather, if anyone followed the hyperlinks posted on the p2pnet site. 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." The Court concluded that "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."

Hyperlink Does Not Constitute As Publication

Even if the plaintiffs had been successful in arguing that the posting on the p2pnet website was published, they were faced with a second hurdle: they needed to show that the defamatory words were published on the p2pnet website. The plaintiffs argued that the hyperlink to the four articles was itself a publication of the defamatory words on the originating site. The Court framed this issue as "whether creating a hyperlink to defamatory material is publishing the defamation."

In considering this issue, the Court referred to the case of Carter v. B.C. Federation of Foster Parents Assn, where the Court of Appeal considered whether publication of a web address in a newsletter constituted publication of the contents of the website. The Court of Appeal decided that it did not. In so doing, the Court of Appeal in the Carter case referred to the New York cases of MacFadden v. Anthony and Klein v. Biben "where the courts held reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a replication of such defamatory comment."

Unlike in the Carter case, the issue being considered before this Court in the present case was whether the creation of a hyperlink amounted to publication of the contents of the linked site. The Court analogized the situation to that of footnotes in an article. The Court stated that "where a footnote leads a reader to further material, that does not make the author who provided the footnote a publisher of what the reader finds when the footnote is followed." However, the Court recognized that one potential shortfall of analogizing a hyperlink to a footnote was "the ease with which a hyperlink allows the reader, with a simple click of the mouse, to instantly access the additional material." Nevertheless, the Court was not deterred from using the analogy and ultimately relied on it. The Court stated that "although a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content of the originating site. This is especially so as a reader may or may not follow the hyperlinks provided."

The Court further stressed that "the defendant did not publish any defamatory content on the p2pnet website itself [;] the 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. In these circumstances, a reader of the p2pnet website who did not click on the hyperlinks provided would not have any knowledge of the allegedly defamatory content."

However, the Court was careful to clarify that it was not establishing a blanket rule that hyperlinking could never make a person liable for the contents of a remote site. For example, "…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."

Comment

The Court in the Wikimedia case was careful not to foreclose the possibility of imposing liability on the creator of a hyperlink to defamatory materials. That possibility is most likely when the creator of the posting makes approves of the defamatory materials or repeats the defamatory materials.

In declining to apply the principle that "publication is presumed where statements are made in books or newspapers or where they are broadcast to the general public" to Internet postings, the Court implicitly recognized that there are circumstances where there ought to be differential treatment as between postings on the Internet and paper-based materials. One policy reason behind this is that paper-based materials, once created, are fixed in time, whereas materials posted on websites can be changed at anytime. For example, consider the situation where a blogger creates a posting that includes a hyperlink to another posting. Ten days later, the author of the other posting adds a defamatory statement to its posting - the blogger's post still includes the hyperlink which now leads to defamatory material. If a person accesses the hyperlink via the blogger's posting, should the blogger be held liable for defamation?

It is reasonable that a Court should only find a creator of a hyperlink liable for the material on the linked site if the creator has either made a comment relating to the material or repeats the material. This requirement would hopefully serve to protect the creator from liability for defamatory materials being added after creation of the hyperlink.