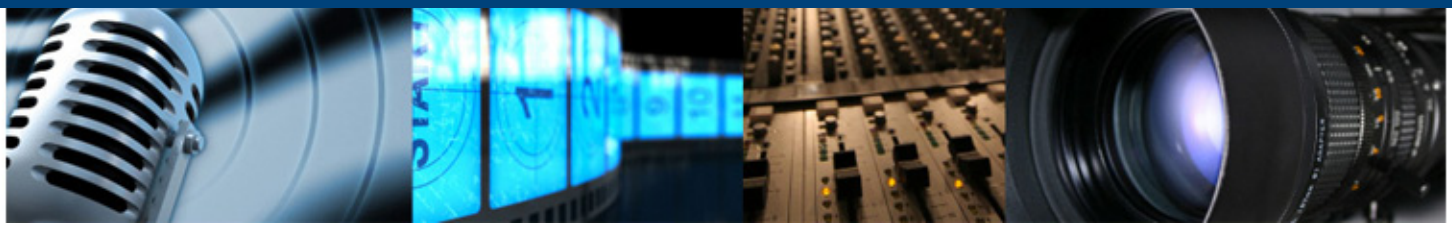


Crookes v Newton - Hyperlinks and Liability

October 20, 2011 by Bob Tarantino

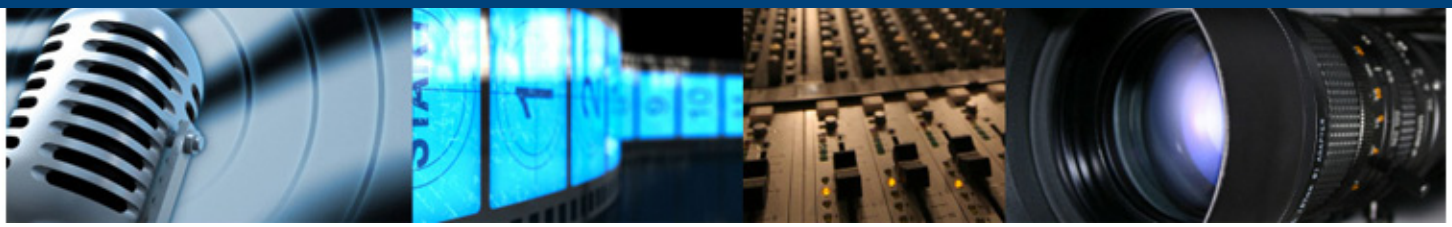
It's been an exciting few years (relatively speaking) for defamation law in Canada: in 2008 the Supreme Court of Canada handed down its decision in *WIC Radio Ltd. v. Simpson* 2008 SCC 40, which modified the defence of fair comment and seemed to herald a new course in defamation jurisprudence, indicating a "re-balancing" of the interests of reputation and free expression; in 2009, we were treated to the Supreme Court's decision in *Grant v. Torstar Corp.* 2009 SCC 61, which entrenched the new "responsible communication on matters of public interest" defence, and further confirmed the Court's willingness (if not desire) to reassess defamation law. (For my my views on what *WIC Radio* and *Grant* signify with respect to the impact of technology on reputation, see my article "Chasing Reputation: The Argument for Differential Treatment of "Public Figures" in Canadian Defamation Law".)

Now, in 2011, the Supreme Court has released its decision in *Crookes v. Newton* 2011 SCC 47, which speaks to the issue of liability for defamation when hyperlinking to defamatory content and which, I think, rather radically extends the underlying impulses that the Court had already evidenced with respect to the importance of freedom of expression in *WIC Radio* and *Grant*.

The decision has been comprehensively and ably covered elsewhere (see especially Barry Sookman, Howard Knopf, Michael Geist and my colleague Simon Chester at slaw). To summarize, the majority decision (written by Justice Abella, who was joined by five others) draws a *very* "bright line" test which provides that a hyperlink to defamatory content does not constitute publication of the defamation and can only constitute publication if the creator of the hyperlink *repeats the libel* - in other words, it appears that the hyperlinker would have to actually copy content from the target site and include it at the linking site in order to be found liable. The concurring reasons of Justices McLachlin and Fish offer a slight smudging of the bright line: they say that if the creator of the hyperlink "adopts" or endorses the content at the target site, then the provision of the hyperlink could constitute publication (so, for example, if the hyperlinker wrote something along the lines of "To read the damning truth about [person X], click on this link]", that would appear to qualify as an adoption/endorsement, and hence publication, on the McLachlin/Fish approach). The third set of reasons, written by Justice Deschamp, while concurring in the result, effectively constitute a dissenting opinion, since the "bright line" of the majority's reasons is sacrificed for a complicated and difficult to understand process of assessing whether the hyperlinker made the defamatory content "readily available" - the analysis seems pre-determined to find liability among a wide swath of activity which the majority and concurring reasons expressly seek to exempt from liability.

As I mentioned, others have written in detail on the case and so there's little which I can add which is novel or consequential. But I thought two related elements of the case were worth remarking on.

- First, we should note just how "bright" the bright line drawn by the majority reasoning is: it effectively means that hyperlinking in and of itself can never constitute publication - if the



hyperlinker has to "repeat" the defamatory content, then their liability is really rooted in the fact that they themselves "uttered" (or published) the libel, not the fact that they linked to defamatory content that was first published elsewhere. As Justice Abella writes at para. 40 [emphasis in original]: "individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning; not beccause they have created a reference, but because, understood in context, they have actually *expressed* something defamatory [citation omitted]. This might be found to occur, for example, where a person places a reference in a text that repeats defamatory defamatory content from a secondary source".

- Second, the internet itself seems to have acquired or been elevated to some kind of quasi-juridical value which deserves protection in itself (see paras. 33-36). It appears at moments in the reasoning that what needs to be protected is not so much freedom of expression but freedom of expression *on the internet*. This provides further evidence of a tendency I noted earlier of courts modifying their approach to online defamation because the nature of the technology itself meaningfully alters what "defamation" and "reputation" actually mean. Even if it's not apparent from *Crookes v Newton* on its own, when viewed as just the latest installment of a process which began with *WIC Radio*, it seems apparent (at least to me) that we're in the midst of a profound rebalancing of how and why society (or at least the law) protects individual's reputation. Certainly comparing decisions from the 1990s such as *Hill* to the current trilogy can lead to some cognitive whiplash.
