

Editors' note: Corrigendum released September 18, 2009. Original judgment has been corrected, with text of corrigendum appended.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crookes v. Newton*,
2009 BCCA 392

Date: 20090915
Docket: CA036623

Between:

Wayne Crookes and West Coast Title Search Ltd.

Appellants
(Plaintiffs)

And

Jon Newton

Respondent
(Defendant)

Corrected Judgment: The text of the judgment was corrected at paragraph 84 where changes were made on September 18, 2009

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Bauman

On Appeal from the Supreme Court of British Columbia, Vancouver Registry,
Docket No S072729, 2008 BCSC 1424, October 27, 2008

Counsel for the Appellants: R.A. Kasting

Counsel for the Respondent: D.W. Burnett

Place and Date of Hearing: Vancouver, British Columbia
May 25, 2009

Place and Date of Judgment: Vancouver, British Columbia
September 15, 2009

Dissenting Reasons by:

The Honourable Madam Justice Prowse

Written Reasons by:

The Honourable Madam Justice Saunders (Page 28, para. 78.)

Concurred in by:

The Honourable Mr. Justice Bauman

Dissenting Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

[1] Mr. Crookes and West Coast Title Search Ltd. (together, “Mr. Crookes”) are appealing from the order of a trial judge, made October 27, 2008, dismissing their action against Mr. Newton for damages for defamation. The order was made pursuant to cross-applications by Mr. Crookes and Mr. Newton pursuant to Rule 18A of the *Rules of Court*.

[2] The trial judge dismissed Mr. Crookes’ action on the basis that Mr. Crookes had failed to prove publication of the alleged defamatory material. If Mr. Crookes is successful on appeal, it will be necessary to remit other issues raised in the pleadings to the trial court for determination.

[3] Mr. Crookes has also sued several other defendants for defamation relating to the same materials at issue in this appeal. He has obtained default judgment against one defendant; his action against two others has been dismissed; and the trial of his action against two further defendants has been adjourned generally.

[4] In brief, Mr. Crookes alleges that he has been defamed in various articles which first appeared on the Internet in 2005. Three of the articles, entitled “Wayne Crookes”, “Friends of Crookes” and “Gang of Crookes” appeared on the website, www.openpolitics.ca (“openpolitics”). A fourth article, entitled “Wayne Crookes”, appeared on the website, www.usgovernetics.com (“usgovernetics”).

[5] Mr. Newton owns and operates the website, www.p2pnet (“p2pnet”). On July 18, 2006, he authored an article, headed “Free Speech in Canada” which hyperlinked the Wayne Crookes article found on the usgovernetics website, and the openpolitics website containing the other impugned articles. Those articles, in turn, were hyperlinked to one another. Mr. Crookes takes the position that, by creating these hyperlinks, or, by refusing to remove the hyperlinks when advised of their

defamatory character, Mr. Newton became a publisher of the impugned articles found at the hyperlinked websites.

ISSUES ON APPEAL

[6] The overriding issue on appeal is whether the trial judge erred in finding that Mr. Crookes had failed to prove publication of the impugned hyperlinked articles.

This issue can be broken down into two sub-issues, namely:

(1) whether the trial judge erred in finding that the creation of a hyperlink in a website does not lead to a presumption of publication of the materials found at the hyperlinked site;

and

(2) 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 sites, taking into account all of the evidence.

[7] There was no issue raised on appeal as to whether the impugned articles were, in fact, defamatory. For the purpose of this appeal, I will assume, without deciding, that the articles were defamatory of Mr. Crookes. This appears to have been the approach adopted by the trial judge.

BACKGROUND

[8] Mr. Crookes is a Vancouver businessman and the President and sole shareholder of West Coast Title Search Ltd. He is described in his factum as being a “sometime volunteer” for the Green Party of Canada. It is his connection with the Green Party which is the subject of the various articles he claims to be defamatory.

[9] Mr. Newton describes himself as a journalist. His p2pnet website provides unrestricted access via the Internet. The website contains commentary on various issues, including issues involving free speech and the Internet. After becoming aware of a defamation action Mr. Crookes’ had commenced in May 2006 against a Mr. Pilling (who is alleged to be the original author of the offending articles found on openpolitics), Mr. Newton used his p2pnet site to distribute his article, “Free Speech in Canada”. That article referred to Mr. Crookes’ action against Mr. Pilling and the

implications of such actions in terms of free speech for those who operate Internet forums. As earlier stated, he created a hyperlink in his article to the Wayne Crookes article on the usgovernetics website and another hyperlink to the openpolitics website where the other impugned articles are found. Mr. Newton, who did not know Mr. Crookes, did not reproduce in his own article any of the content of the offending articles, or comment in any way on their content.

[10] Mr. Newton's article came to Mr. Crookes' attention on July 18, 2006. On August 18, 2006, Mr. Crookes sent an email to Mr. Newton at the email address provided by Mr. Newton on his p2pnet website requesting Mr. Newton to remove the hyperlinks to both the usgovernetics and openpolitics websites. He received no response to this request. On October 31, 2006, Mr. Crookes' lawyer wrote to Mr. Newton asking Mr. Newton to remove the hyperlinks on the basis that the sites contained material defamatory of Mr. Crookes. Mr. Newton refused to do so. He subsequently deposed that his refusal was based on his view that there was no need to remove them because they were "merely a hyperlink".

[11] As of February 1, 2008, the article "Free Speech in Canada" had been "viewed" a total of 1,788 times. There was no evidence as to how many times, if any, the hyperlinks in the article had been viewed, and no evidence as to whether it was possible to obtain such information, and, if so, at what cost.

[12] The summary trial was heard on August 29, 2008. At the hearing, it was common ground that the trial judge could decide the issue of whether Mr. Newton was a publisher of the impugned articles on the basis of the materials filed.

DECISION OF THE TRIAL JUDGE

[13] The trial judge referred to the issues before him at paras. 10-11 of his reasons for judgment, as follows:

[10] There are two issues for determination in this application. First, the defendant says that there is no evidence that any person followed the hyperlinks in question or read the words that are complained of. The plaintiffs

have therefore failed to prove publication, one of the essential elements of the tort of defamation.

[11] Second, in any event, the defendant argues that creating a hyperlink to words that are defamatory is not publication of those words.

[14] The trial judge noted that the defendants took the position that the defences of fair comment and qualified privilege were not suitable for summary disposition.

[15] After asking the question (at para. 13), “Are the plaintiffs required to lead evidence that persons actually followed the hyperlinks and read the words that are complained of?”, the trial judge observed that Mr. Crookes’ position was that publication of the hyperlinked material should be presumed by analogy with statements contained in newspapers, and those broadcast to the general public, which are deemed to be published under ss. 2 and 12(2) of the *Libel and Slander Act*, R.S.B.C. 1996, c. 263. The trial judge rejected this submission.

[16] After referring to several authorities, and noting Mr. Crookes’ argument that the fact that Mr. Newton’s website permitted unrestricted access operated as a factor favouring a presumption of publication, the trial judge focused on the fact that Mr. Crookes had not led evidence that a third party had actually accessed the hyperlink to the impugned articles. At para. 20 of his reasons for judgment, the trial judge stated:

[20] Regardless [of the unrestricted access to Mr. Newton’s internet site], 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. As in *Crookes v. Holloway* [2007] BCSC 1325, 75 B.C.L.R. (4th) 316, aff’d 2008 BCCA 165, 77 B.C.L.R. (4th) 201], the plaintiffs have not adduced any evidence to support this claim.

[17] The trial judge expressly rejected the argument that there was a presumption of publication to a third party at para. 24 of his reasons for judgment:

[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.

[18] The trial judge then went on to consider whether, absent a presumption of publication, Mr. Newton's use of hyperlinks to the defamatory material constituted publication of the defamatory material by him. In that respect, the trial judge placed considerable reliance on the decision of this Court in *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, 42 B.C.L.R. (4th) 1, where this Court held that the reference to a website in a printed newsletter, where there was no element of control by the defendant over that website, did not amount to publication of defamatory material found at that site. Although this Court specifically declined to express any view as to whether a reference in an internet website to another site could give rise to publication of the defamatory material found at the second site, the trial judge in this case adopted the reasoning in *Carter* to find that hyperlinking in this case did not amount to publication by Mr. Newton of the hyperlinked articles. He drew an analogy between footnotes in an article and the hyperlinks in this case and expressed the view (at para. 28) that a footnote which refers to another source "does not make the author who provided the footnote a publisher of what the reader finds when the footnote is followed".

[19] Key passages from the trial judge's reasons with respect to the issue of whether hyperlinking in this case amounted to the publication of the defamatory articles by Mr. Newton are paras. 29-31, as follows:

[29] A hyperlink is like a footnote or a reference to a website in printed material such as a newsletter [as in *Carter*]. The purpose of a hyperlink is to direct the reader to additional material from a different source. The only difference is the ease with which a hyperlink allows the reader, with a simple click of the mouse, to instantly access the additional material.

[30] Although a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content on the originating site. This is especially so as a reader may or may not follow the hyperlinks provided.

[31] I conclude that the reasoning of the Court of Appeal in *Carter* leads to the same conclusion on the narrower issue before me. Readers of a newsletter, whether in paper form or online, who read of a reference to a third party website, may go to that website. I conclude that that does not make the publisher of the web address a publisher of what readers find when they get there.

[20] The trial judge emphasized that Mr. Newton did not publish any defamatory material in his own article on the p2pnet website; he did not reproduce any of the content from the impugned articles; and he did not comment on them. The trial judge adopted the proposition found in *MacFadden v. Anthony*, 117 N.Y.S. 2d 520 (Sup. Ct. 1952), and *Klein v. Biben*, 296 N.Y. 638, 69 N.E. 2d 682 (Ct. App. 1946), that “reference to an article containing defamatory content without repetition of the comment itself should not be found to be a republication of such defamatory content”.

[21] The trial judge also made it clear, however, that it was not his view that hyperlinking could never make a person liable for the contents of the hyperlinked site. At para. 34, he stated:

[24] ... 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.

[22] The trial judge did not address the fact that Mr. Newton refused to remove the hyperlinks when requested to do so by Mr. Crookes.

DISCUSSION

1. General Principles

[23] This appears to be the first case at the appellate level in Canada which addresses the question of if and when an author of an article who provides a hyperlink in his or her article to another website or article which contains defamatory material can be found liable for defamatory comments contained in the linked articles. The implications of this issue are significant. I find it useful, therefore, to refer to some “first principles” which should be kept in mind in undertaking this analysis.

[24] It is trite law that defamation cannot be found without publication. Publication is defined in the following extract from *The Law of Defamation in Canada* (Raymond Brown, 2d ed. Looseleaf (Scarborough, Ont: Carswell, 1994)), vol. 1, at 7-4, 7-5:

Publication is a term of art meaning the communication of defamatory matter to a third person.” It is a bilateral act by which the publisher makes available to a reader, listener or observer in a comprehensible form the defamatory information. Therefore, the defamatory remarks, about which the plaintiff complains, must be shown to have been published to a third person, that is, they must have been communicated to some person other than the one defamed, even if that involves only a single individual ... [Footnotes omitted.]

[25] The Internet has fostered an exponentially expanded opportunity for individuals to communicate about every conceivable matter to the world at large. It has, thus, created an exponentially expanded potential for the spread of defamatory material. This fact has presented challenges to courts seeking to find the balance between the competing values of freedom of speech and protection of reputation which arise in defamation cases. One expression of the nature of those competing interests in the Internet context is found in an article, Lyrissa Barnett Lidsky, “Silencing John Doe: defamation & discourse in cyberspace” (2000), 14:4 Duke L.J. 855, where the author, in commenting on the potential effects of “libel chill” on freedom of speech, states at 860-61, 863-64:

The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to “publish” their views on matters of public concern. The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse. In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy.

...

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie.” The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse. [Footnotes omitted.]

[26] In Australia, the High Court referred to the ubiquity of the Internet and the special challenges it presents to the law of defamation in *Dow Jones and Company Inc. v. Gutnick*, [2002] HCA 56, 210 CLR 575. There, in dealing with a jurisdictional issue concerning the downloading in Victoria of defamatory material contained in the *Wall Street Journal* and *Barron's Online*, Gaudron J. (in reasons concurring with the majority) reviewed in some detail the challenges presented by the Internet and the World Wide Web in the context of defamation. In his reasons for judgment, Gaudron J. rejected the notion that effective remedies for Internet defamation were not possible. At paras. 115-116 of the decision, he stated:

[115] Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable. Instruments of international human rights law recognise the right of “[e]veryone ... to hold opinions without interference” and to enjoy “the right to freedom of expression ... [including] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers... through any... media of his choice”. [*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (“ICCPR”)]

[116] The [ICCPR] also provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”. And that “[e]veryone has the right to the protection of the law against such interference or attack”. Accordingly, any development of the common law of Australia, consistent with such principles, should provide effective legal protection for the honour, reputation and personal privacy of individuals. To the extent that our law does not do so, Australia, like other nations so obliged, is rendered accountable to the relevant treaty body for such default.

Canada became a signatory of the ICCPR on May 19, 1976.

[27] In *Carter*, this Court noted that the relative weight to be given to the concepts of freedom of expression and protection of individual reputation in the defamation context is one which is value laden and policy-directed. In preferring English and Australian authorities over the “single publication rule” adopted in the United States Mr. Justice Hall, speaking for the Court in *Carter* stated, at para. 20:

[20] Ultimately, the question of whether the Commonwealth or American approach is preferable has a considerable element of policy inherent in it.

Recently, in *Gilles E. Neron Communication Marketing Inc. v. Chambre des notaries du Quebec*, [2004] 3 S.C.R. 95, 2004 SCC 53, a defamation case brought against the CBC by a communications consultant employed by the Chambre des notaries, LeBel J. for the majority remarked on the balancing the courts must undertake in defamation actions (at paras. 52 and 54):

Despite its undoubted importance, freedom of expression is not absolute. As this Court noted in *Prud'homme* [*v. Prud'homme*], [2002] 4 S.C.R. 663, 2002 SCC 85], at para. 43, freedom of expression can be limited by the requirements imposed by other people's right to the protection of their reputation. Cory J. observed in *Hill* [*v. Scientology*], [1995] 2 S.C.R. 1130], at para. 108, that reputation, as an aspect of personality, is equally worthy of protection in a democratic society concerned about respect for the individual:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

...

In an action for defamation the two fundamental values of freedom of expression and the right to respect for one's reputation must be weighted against each other to find the necessary equilibrium ... [Emphasis of LeBel J.]

[28] I do not understand the more recent decision of the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 to have resiled from these statements of principle. On the contrary, at para. 2 of the decision, Mr. Justice Binnie, speaking for the court, stated:

[2] This is a private law case that is not governed directly by the *Charter*. Yet it was common ground in the argument before us that the evolution of the common law is to be informed and guided by *Charter* values. Particular emphasis was placed on the importance of ensuring that the law of fair comment is developed in a manner consistent with the values underlying freedom of expression. However, the worth and dignity of each individual,

including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression, including freedom of the media. The Court's task is not to prefer one over the other by ordering a "hierarchy" of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835), but to attempt a reconciliation. An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. ... [Emphasis added.]

[29] It is with these basic principles in mind, and acknowledging the challenges presented by Internet communications in the context of the law of defamation, that I turn to the specific issues concerning publication on the Internet raised in this appeal.

2. Standard of Review

[30] The question of publication is a question of fact to be determined in the circumstances of each case. The standard of review for findings of fact is one of palpable and overriding error. Here, however, Mr. Crookes has alleged that the trial judge made errors in law in failing to find publication. The standard of review with respect to errors of law is one of correctness. (See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8.)

3. Publication to a Third Party

(a) Presumption of Publication

[31] The principal argument of Mr. Crookes at trial was that the trial judge should apply a presumption of publication of the hyperlinked articles, by analogy with statements made in newspapers or broadcast to the general public.

[32] As observed by the trial judge, however, the presumption of publication in relation to newspapers and broadcasts is expressly provided for in ss. 2 and 12(2) of the *Libel and Slander Act*, which provide:

2 Defamatory words in a broadcast are deemed to be published and to constitute libel.

...

12(2) The production of a printed copy of a newspaper is proof, in the absence of evidence to the contrary, of the publication of the printed copy.

[33] There is no such statutory provision providing for presumed publication of communications distributed through the Internet. Nor was the judge persuaded that he should extend the presumption of publication to Internet communications, and, in particular, to the impugned articles accessible by the hyperlinks contained in Mr. Newton's article.

[34] In this appeal, Mr. Crookes continues to maintain that there should be a presumption of publication in these circumstances. In support of his submission, Mr. Crookes refers to the following passage from the 10th edition of *Gatley on Libel and Slander* (Patrick Milmo, Q.C. & W.V.H. Rogers, eds., 10th ed. (London: Sweet & Maxwell, 2004)) at 6.13, under "Proof of Publication":

The fundamental principle is that the matter must be communicated to a third party in such a manner as to be capable of conveying the defamatory imputation about the claimant. However, it is not necessary in every case for the claimant to prove directly that the words complained of were brought to the actual attention of some third person in this sense. If he proves facts from which it can be inferred that the words were brought to the attention of some third person, he will establish a prima facie case. This is particularly obviously so where the matter is contained in a book or distributed in the news media or on the internet where in practice it would seem impossible to rebut the inference and in such a case it would seem that the presumption of publication would be impossible to displace. [Emphasis added.]

[35] It is interesting to note, however, that the 11th edition of *Gatley* (2008) took a more cautious approach to this subject by removing the italicized words ("or on the internet") from the above passage, and adding the following:

However, it has been held that in the case of material placed on the Internet there is no basis for a presumption of law that there has been publication to a substantial number of persons within the jurisdiction, though evidence of the number of times the site was accessed may justify the trier of fact in drawing

the inference that a substantial number of persons did read the material complained of.

[36] In coming to the conclusion that there was no presumption of publication on these facts, the trial judge relied on *Crookes v. Holloway*, 2007 BCSC 1325, 75 B.C.L.R. (4th) 316, aff'd in *Crookes v. Yahoo! Inc.*, 2008 BCCA 165 (*sub nom. Crookes v. Holloway*), 77 B.C.L.R. (4th) 201 [*Holloway*]. There, Mr. Crookes argued that there should be a presumption of publication in British Columbia with respect to alleged defamatory material found on the Yahoo Inc.! site. The trial judge in *Holloway* rejected that submission and dismissed the action for want of jurisdiction. This Court upheld her decision. With respect to Mr. Crookes' argument that there should be a presumption of publication, Mr. Justice Lowry, speaking for the Court, stated, at para. 6 of the decision:

[6] In *Wiebe [v. Bouchard]*, 2005 BCSC 47, 46 B.C.L.R. (4th) 278] significance was attached to the fact the libellous statements were posted on the internet nationwide as well as being made available in the main public library in Victoria. But they were posted on a Government of Canada website and, as was noted, were made available to everyone in the country who had a computer. By contrast, the statements that are the subject of Mr. Crookes' action were posted on a website with restricted access that was not available to the public. The basis for any presumption that might be said to have been recognized in *Wiebe* does not exist here. I do not consider the mere fact a statement was posted on a website with the kind of restricted access there was in this case supports the presumption it was read by anyone in British Columbia. [Emphasis added.]

[37] Mr. Justice Lowry went on to state that he found no error in the trial judge's finding in that case that there was no evidence to support an inference of publication.

[38] On appeal, Mr. Crookes has not relied on the *Wiebe* decision, but he again seeks to distinguish the *Holloway* decision on the basis that Mr. Newton's site has unrestricted access, thus arguably providing a stronger basis for finding a presumption of publication of the material found on it.

[39] Given the apparent lack of difficulty in establishing the number of times the primary site was accessed in this case, I do not see how it furthers Mr. Crookes' case for him to say that Mr. Newton's p2pnet site has world-wide accessibility (except to distinguish the case from *Holloway*). It may have world-wide accessibility, but it is an accepted fact that it had been accessed 1,788 times. It follows that the links to those articles on p2pnet have been accessed no more than 1,788 times. In any event, the critical question is not whether there is a presumption of publication of Mr. Newton's article, but whether there is a presumption of publication with respect to the hyperlinked websites and articles.

[40] There are undoubtedly world-wide sites dealing with topics which are of no interest to anyone except the author. There are others which are probably viewed millions of times each day. It may be that in the latter case, a presumption of publication could arise with respect to a particular site. A presumption of publication of articles hyperlinked to such a site, however, would still be one-step (or one click) removed.

[41] I agree with the trial judge that there is no sound basis for finding a presumption of publication of the hyperlinked articles in this case. None of the authorities relied on by Mr. Crookes provides a persuasive basis for such a presumption. Assuming there may be compelling reasons for a presumption of publication with respect to materials distributed on the Internet, and, in particular, with respect to hyperlinked materials (and this Court is not in a position based on the evidence in this case to make such a determination), that is a matter which may more readily be determined by the Legislature, rather than by the courts in the first instance. Courts are restricted to the record before them which, in many cases, does not permit the appropriate weighing of values and interests which should be taken into account when a change in the law such as this is advocated. The continuing evolution of the Internet is a phenomenon which raises many complex questions with far-reaching implications on an international scale. I would be loathe to venture into this area without a better compass than has been provided in this case.

[42] In the result, I agree with the trial judge that there is no presumption of publication of hyperlinked articles; that is, there is no presumption that a reader who accesses an internet source containing hyperlinks also accessed the articles found at the hyperlinked source. Nor do I find any persuasive basis for creating such a presumption on the facts of this case.

[43] Before concluding this point, I note that the trial judge referred to an English authority, *Amoudi v. Brisard*, [2006] EWHC 1062, All E.R. 294 (Q.B.), which, in turn, referred to *Jameel v. Dow Jones*, [2005] EWCA Civ. 75, [2005] Q.B. 946, as supportive of his conclusion that there is no presumed publication of material distributed on the Internet. Mr. Crookes submits that the trial judge erred in his discussion of those cases by stating that substantial publication (rather than publication to one person other than the plaintiff) is required in England. I agree with Mr. Newton that, whether or not the trial judge erred in making that statement, he was correct in finding that those authorities support the proposition that, in England, there is no presumption of publication (substantial or otherwise) with respect to Internet publications.

[44] In this case, having correctly concluded that there is no presumption of publication of the hyperlinked materials, the trial judge went on to consider whether, nonetheless, Mr. Newton could be found to have published the impugned articles by hyperlinking them to his free speech article. I now turn to that question.

(b) Hyperlinking as a Form of Publication by Mr. Newton

[45] At the outset of this discussion, it is important to note that the trial judge did not purport to hold that placing a hyperlink on an internet document can never amount to publication of the materials found at the hyperlink. Rather, he restricted himself to the facts of this case and found that, in these circumstances, Mr. Newton's use of a hyperlink to the openpolitics and usgovernetics sites where the impugned articles are found did not amount to publication by him of the hyperlinked articles.

[46] A “user-friendly” overview of the nature of Internet communications is found in the judgment of Kirby J. in *Gutnick*, who was responding to the appellant’s submission in that case that the Internet is such a different medium of communication that it required a reconsideration of the common law with respect to the law of defamation. At paras. 80-83 of the decision, Kirby J. stated:

[80] ...The Internet is essentially a decentralised, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, borderless, global and ambient in its nature. Hence the term “cyberspace”. This is a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge. The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware.

[81] *The World Wide Web*: The Web is a forum consisting of millions of individual “sites”. Each site contains information provided by, or to, the creator of that site. When a publisher of information and opinion wishes to make its content available on the Web, it commonly does so by creating a “website” and “posting” information to that site. Such a website is a collection of electronic messages maintained on a type of computer known as “web server”. Typically, this is controlled either by the publisher concerned or by a third party contracted by the publisher to provide “web hosting” services.

[82] An Internet user may access the information maintained on a website provided the user knows, or can ascertain, the Internet address of the relevant website. By entering that address into the user’s web browser, the user will be directed to that website. Once the user locates the website in this way, the user may be required to take additional steps to access information stored on the web server associated with the website. Thus, to post an article to a website, a publisher must prepare a version in digital (computer readable) format. Such an article becomes part of the digital collection of data known as a web page. Such a web page is transmitted to a web server. It, along with the other web pages, comprises the website.

[83] By posting information on a website, the publisher makes the content available to anyone, anywhere, having access to the Web. However, accessibility will depend on whether there is open access (under which any web user can access the site); subscription access (under which only web users who register, and commonly pay, for the service can secure access); combination access (where only a portion of a site may be accessed after registration and/or payment of a fee) and restricted access (access limited to specified users authorised by the website operator to view the website, eg employees of a particular company). [Footnotes omitted.]

[47] As earlier stated, Mr. Newton's site, p2pnet, is available worldwide to any Internet user who accesses his site. Thus, any user who goes to his site may readily access the Wayne Crookes article on the usgovernetics site and the openpolitics site by simply clicking on the hyperlinks in the p2pnet site.

[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. (I am not dealing here with hyperlinks which may be added to a site by someone other than the website owner.) 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).

[49] In order to place the hyperlinks here in context, I will quote from Mr. Newton's article found at his p2pnet site:

This is just short heads-up to let you know the number of p2pnet story posts may go down over the next little while.

That's because the Freedom of Expression in Canada campaign, kick-started by the libel suit brought against me by, initially, Sharman Networks and, latterly, by Kazaa ceo Nikki Hemming alone, is gathering momentum.

...

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.

We've decided to pool some of our resources to focus more attention on the appalling state of Canada's ancient and decrepit defamation laws and tomorrow, p2pnet will run a post from Mike [Pilling] on his troubles. He and I will also be releasing a joint press statement in the very near future.

[50] The underlined words “OpenPolitics.ca” and “Wayne Crooks” are hyperlinked to Mr. Newton’s article. The hyperlink to Wayne Crooks, if clicked, takes the user to a site posted on the usgovernetics website, and contains material which Mr. Crookes claims is defamatory. The hyperlink to OpenPolitics.ca connects the reader to a website containing a series of interlinked articles which contain materials Mr. Crookes claims are defamatory. It is unnecessary to repeat the contents of those articles, since the question of whether they are in fact defamatory of Mr. Crookes is assumed for the purpose of this appeal.

[51] Mr. Newton’s article, which is ten paragraphs long, ends with the word “Jon”. It is followed by an invitation to “Post a Comment To This Story” and with a reference to other websites which are not in issue.

[52] Mr. Crookes sent an email to Mr. Newton dated August 18, 2006, headed “URGENT LEGAL DEMAND” advising Mr. Newton that his links to usgovernetics and openpolitics libelled him; that Mr. Newton had a responsibility for the libel on the websites he linked, and requesting Mr. Newton to remove the links. Mr. Newton did not reply. Although the email was sent to Mr. Newton’s correct email address, he deposed that he had not read it.

[53] On October 31, 2006, Mr. Crookes’ lawyer sent a letter to Mr. Newton headed “Re: Wayne Crookes and openPolicitics.ca”, again advising that Mr. Crookes took the position that the hyperlinked article “Wayne Crookes” on the usgovernetics website was defamatory, suggesting Mr. Newton consult a lawyer, and again requesting Mr. Newton to remove it. By email dated November 9, 2006, Mr. Newton confirmed that he would not be removing the hyperlinks to either site.

[54] In his affidavit in support of his application to dismiss the action, Mr. Newton deposed that he saw hyperlinks “as the equivalent of a footnote or bibliographical reference” and went on to depose (in argument disguised as evidence) that there are good reasons for not making authors who hyperlink other websites or articles responsible for the content of the hyperlinked materials. In answer to interrogatories, Mr. Newton further deposed that he created the link because “It’s

standard internet, and p2pnet, procedure to link pages referred to in posts.” He denied having read the openpolitics articles concerning Mr. Crookes prior to creating his own link to that site. In answer to the question why he refused to remove the hyperlinks from his website after being requested to do so, Mr. Newton deposed that “I saw no need. It was merely a hyperlink.”

[55] It was in this context that the trial judge concluded that Mr. Newton’s use of hyperlinks in his article did not amount to publication by him of the articles found at those links. He accepted Mr. Newton’s argument that the manner in which he used the hyperlinks was analogous to a bibliographical footnote and concluded that an author who provides such a footnote in an article does not thereby become a publisher of the material contained at the footnoted source. In his view, the only difference between a footnote and a hyperlink is the ease with which a hyperlink can be accessed – simply by the click of a mouse (or key).

[56] In coming to the conclusion that Mr. Newton’s use of hyperlinking in this case did not amount to publication by him of the material found at those sites, the trial judge placed considerable reliance on the reasoning of this Court in *Carter*. There, the plaintiff sued the defendant, the B.C. Federation of Foster Parents Assn. (the “Federation”), and others with respect to defamatory articles contained in two internet “forums” or “chat rooms”. One forum was under the control of the Federation (the “Federation Forum”); the other, the “Bopeep Forum” was not. A group of individual defendants comprising the B.C. Foster Care Support Network (the “Network”) had prepared a written newsletter which contained an Internet address for the Bopeep Forum, and the comment that “more news” could be found at that address. This newsletter was distributed by the Federation to its board members. An issue arose as to whether the Federation thereby became liable, as a publisher, for the defamatory comments found at the Bopeep site.

[57] The trial judge found that the reference in the written newsletter to the Bopeep Forum website did not in the circumstances amount to publication by the Federation of the defamatory materials found at that site. This Court agreed with the

trial judge. The relevant part of this Court's decision in that respect is found at paras. 10-13:

[10] The appellant argues, making special reference to the case of *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), that the respondent Federation should have been found liable for referring recipients of the Network newsletter to the website where the offensive comments could be found. The *Hird* case concerned an application for a new trial of a libel action. The plaintiff appellant owned a number of cottages in a village and lived in one of the cottages. A new business was set up by boiler makers near to the cottages and the plaintiff obtained an injunction to restrain the carrying on of the business in such a way as to be injurious to his property and as a result the boilermakers' business terminated. Certain individuals in the neighbourhood were displeased by this result and decided to take up a subscription for the persons whose business had been terminated. On a public occasion, a placard was set up containing a notice that subscriptions might be donated to the former owners of the business "who have been ruined in their business and their living taken away by the animosity of one man". I take it from the report of the case that it was common ground that the one man referred to was the plaintiff appellant. Throughout the first trial there was no evidence as to who wrote the words on the placard or who erected it, but it was proven that the defendant took up a position near to the placard and remained there pointing at the placard with his hand and attracted attention of passers-by to the placard. At the first trial, the presiding judge held that there was no evidence of publication and directed a verdict for the defendant. The Court of Appeal held that there was evidence of publication sufficient to be passed on by a jury and ordered a new trial.

[11] In the course of his reasons, Taylor J. made reference to *Tacket v. General Motors Corp.*, 836 F.2d 1042 (U.S. 7th Cir. Ind. 1987). In that case, it was held that where a sign defamatory of the plaintiff was left on a plant wall for several months, it was a question of fact for a jury to decide whether or not the defendant employer could be found liable for defamation of the plaintiff employee. Obviously in that case, the employer had control over the plant premises. In the instant case, there is no suggestion that the Federation had any measure of control relative to the Bopeep Forum. Thus the *Tacket* case affords little assistance in this case.

[12] In my opinion, the factual situation here is closer to the situation found to exist in the New York cases of *MacFadden v. Anthony*, 117 N.Y.S.2d 520 (U.S. N.Y. Sup. Ct. 1952) and *Klein v. Biben*, 296 N.Y. 638 (Ct. App. 1946), referred to by the trial judge where the courts held reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment.

[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. In the result, I am not persuaded that the learned trial judge made any error in his assessment of this aspect of the matter and I would dismiss the appeal on this issue concerning the Bopeep Forum.

[58] I agree with the trial judge that the reasoning of this Court in *Carter* supports Mr. Newton's position that the mere fact that he hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites. Apart from the question of control, (to which I will refer later in these reasons), it is difficult, in principle, to distinguish the act of creating the hyperlinks to the impugned articles in this case from the act of circulating a website address in the newsletter to the Bopeep Forum. As noted by the trial judge, the only notable difference is that somewhat more effort would be required by a person reading the newsletter to type in the Bopeep website and thereby access the site, than to access the websites hyperlinked by Mr. Newton in his article, which could be done in an instant by clicking on the hyperlink. In both cases, the defendants chose to circulate articles linked with the impugned websites in a manner which made the referenced sites readily accessible to anyone who chose to follow the link, whether by typing in the website (in the case of the newsletter) or clicking on the hyperlink (in this case). Thus, although this Court in *Carter* said that it was leaving this issue open, I find that the opening is very narrow.

[59] I also agree with the trial judge, however, that hyperlinking may, in some cases amount to publication by the person creating the link. If it is apparent from the context in which the hyperlink is used that it is being used merely as a bibliographical or similarly limited reference to an original source, without in any way actively encouraging or recommending to the readers that they access that source, then, following *Carter*, I accept that this would not amount to publication.

[60] It is not sufficient, however, for the creator of a hyperlink to simply depose that he intended the link to be in the nature of a “footnote” in order to avoid liability for publication. While the trial judge appears to have limited the footnote analogy to a footnote which simply provides a source reference (similar to a citation to a legal source utilized regularly by judges), many authors use footnotes (and citations) in a much more expansive way. For that reason, I would not accept the footnote analogy to be a complete answer to the question of whether a hyperlink constitutes publication. More significant factors would include the prominence of the hyperlink, any words of invitation or recommendation to the reader associated with the hyperlink, the nature of the materials which it is suggested may be found at the hyperlink (for example, if the hyperlink obviously refers to a scandalous, or obscene publication), the apparent significance of the hyperlink in relation to the article as a whole, and a host of other factors dependant on the facts of a particular case.

[61] The question remains whether, in the absence of a presumption of publication, and accepting that the mere fact of hyperlinking defamatory materials does not constitute publication, there was a factual foundation which would justify an inference of publication of the hyperlinked articles by Mr. Newton. Here, having stated that the hyperlinks in this case were analogous to footnotes, and that there was no express invitation in the original article for the reader to visit the hyperlinks, the trial judge concluded that there was no publication by Mr. Newton, even if the hyperlinks were followed. It does not appear he took any other factors into account in coming to this conclusion. Since Mr. Crookes has argued that the trial judge erred in failing to find publication by inference, I will examine that issue more closely.

(c) Publication by Inference from the Evidence

[62] The trial judge concluded that Mr. Crookes had not established that there had been communication of the alleged libel to a third party. In particular, he observed that Mr. Crookes had not led evidence from any third party that he or she had accessed the hyperlinks in Mr. Newton’s article and read the impugned articles. In

other words, he correctly found that there was no direct evidence of publication to a third party.

[63] There was, however, evidence that Mr. Newton's website which contained the hyperlinks to the impugned articles had been "viewed" (a word which counsel preferred to the word "hit" for reasons which remain unclear to me) 1,788 times. The evidence with respect to this "fact" is that of Mr. Newton, who stated in answer to interrogatories that:

At the time of writing (3:19 pm, February 1, 2008), it [his article] 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.

[64] In answer to a question from the Court, the Court was advised that it is common for ISPs to use software robots to seek and collect information from various sites for a variety of purposes.

[65] No evidence was led as to the possibility of determining whether those who accessed Mr. Newton's p2pnet article also accessed the hyperlinks.

[66] Since there is no presumption of publication with respect to Mr. Newton's article, including the articles accessible via the hyperlinks, the onus was on Mr. Crookes to prove, on a balance of probabilities, that the hyperlinks contained in Mr. Newton's article (or at least one of them) were accessed by at least one person who read the article or articles. Such proof does not require direct evidence from a third person who used the hyperlinks to access the impugned articles. As stated by Ritchie J., speaking for the majority, in *Gaskin v. Retail Credit Co.*, [1965] S.C.R. 297, at 300, 49 D.L.R. (2d) 542:

It was strongly contended by counsel for the respondent that the English cases referred to in *Button on Libel and Slander* and in other text-books established an exhaustive and closed category of circumstances from which publication could be inferred and it appears that McGillivray J.A. subscribed to this view.

In my opinion, however, the general principle is correctly stated in *Gatley on Libel and Slander*, at p. 89, where it is said:

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.

[67] In *Gaskin*, there was no evidence of letters containing allegedly defamatory credit reports having been posted, or having been received by the addressees, but the majority found that it was open to the jury to infer that the reports prepared by the credit company, which was in the business of preparing and sending such credit reports to customers, had likely been received and read by them.

[68] While the drawing of inferences of fact or law is nothing new to trial judges in the context of the many cases which come before them, the language used by the trial judge in this case indicates that he was of the view that there was no evidence from which he could infer publication in these circumstances. This is indicated by the following language employed by him at para. 20 of his reasons for judgment:

[20] Regardless, 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. As in *Crookes v. Holloway*, the plaintiffs have not adduced any evidence to support this claim. [Emphasis added.]

[69] In coming to this conclusion, the trial judge appears to have adopted Mr. Newton's argument, set out at para. 10 of the reasons for judgment, that "there is no evidence that any person followed the hyperlinks in question or read the words that are complained of. The plaintiffs have therefore failed to prove publication ...".

[70] In my view, 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. Unlike the situation in *Holloway*, there was some evidence in this case from which such an inference could be drawn. In particular, there was evidence that Mr. Newton's article had been viewed 1,788 times. Further, since Mr. Newton's p2pnet site emphasizes free speech issues, it is reasonable to assume

that a significant number of those who accessed the “Free Speech in Canada” article were also interested in free speech issues. Mr. Newton encouraged his readers’ ongoing interest in the subject of Mr. Crookes lawsuit against Mr. Pilling by stating that he would “run a post from Mike [Pilling] on his troubles.” Given the fact that the import of Mr. Newton’s article is that defamation suits are a form of attack on free speech, and his reference to defamation suits relating to this issue, it is also reasonable to assume that at least one of those viewers also went to one or both of the hyperlinked sites and read one or more of the articles. Or, to put it another way, it seems unlikely that of the 1,788 who chose to access Mr. Newton’s article on free speech, not one would have chosen to access and read the impugned articles contained at one or more of the hyperlinks. (In coming to this conclusion, I accept that some of the “viewers” of the p2pnet site may have been software robots.)

[71] While the evidence of invitation to visit the hyperlinks was more subtle than a statement in the original article that “the truth about Crookes can be found here”, I find that the number of “views” of the original site, the fact that the article deals with free speech and defamation, and the reference to lawsuits involving Mr. Crookes, would have served as words of encouragement, or an invitation, to a person viewing Mr. Newton’s article to look further. In other words, I do not accept that the hyperlinks, when viewed in the context of the Newton article as a whole, operated as a “mere” bibliographical” footnote.

[72] In summary on this point, I find that the trial judge erred in failing to draw an inference on all of the evidence that Mr. Crookes had established publication of the hyperlinked articles to at least one third party.

(d) A Further Issue

[73] Mr. Crookes raised one further issue with respect to the issue of publication. This issue relates to the fact that Mr. Newton had control over the presence of the hyperlinks on his p2pnet website, that he was advised of the defamatory nature of the material found at the hyperlinked sites, and that he refused to remove the hyperlinks when requested to do so by Mr. Crookes and his lawyer. Mr. Crookes

suggests that these facts provide an additional basis for finding that Mr. Newton was a publisher of the impugned articles found at the hyperlinked sites.

[74] The significance of this issue is alluded to by the trial judge in *Carter (v. BC Federation of Foster Parents Assn. et al.*, 2004 BCSC 137, 27 B.C.L.R. (4th) 123 at paras. 52-54), quoted at para. 9 of this Court's decision:

The law has held liable those who perpetuate defamatory comments by permitting such comments to remain at premises controlled by them even though they did not author or authorize the original publication. See *Byrne v. Deane*, [1937] 2 All E.R. 204, *Hellar v. Bianco*, 111 Cal. App. (2d) 424 (Cal. 1952), *Tacket v. General Motors Corp.*, 836 F. (2d) 1042 (7th Cir. 1987).

Additionally, liability has been found where a defendant wilfully directed others to defamatory statements when he neither authored nor authorized their publication on premises not controlled by him. See *Hird v. Wood* (1894), 38 S.J. 234 (C.A.).

Common to each of these two lines of authorities is 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.

[75] In addition to the authorities referred to in the first paragraph of this extract with respect to this point, Mr. Crookes referred to *Godfrey v. Demon Internet Ltd.*, [2001] QB 201, [2000] 3 W.L.R. 1020, *Bunt v. Tilley*, [2006] EWHC 407, [2007] 1 W.L.R. 1243 (Q.B.), and, by analogy, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427.

[76] The trial judge did not deal with this issue or these authorities in his reasons for judgment. Nor did Mr. Newton address this issue in his factum. In these circumstances, and since I have otherwise found that Mr. Newton was a publisher of the impugned articles, it is unnecessary for me to address this issue. To the extent that it remains an issue in the ongoing proceedings between the parties, it may be dealt with by the trial court.

CONCLUSION

[77] I would allow the appeal, set aside the order of the trial judge, and remit the action to the trial court for resolution of all outstanding issues.

“The Honourable Madam Justice Prowse”

Reasons for Judgment of the Honourable Madam Justice Saunders:

[78] I have had the benefit of reading in draft form the reasons for judgment of Madam Justice Prowse. I agree, for the reasons she has given, there is no basis for finding a presumption of publication of the hyperlinked articles, and that “the mere fact [Mr. Newton] hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites” (para. 58).

[79] I do not agree, however, that the trial judge erred in failing to infer publication to at least one party (para. 72). Nor do I agree the article by Mr. Newton served “as words of encouragement, or an invitation”, to a person accessing Mr. Newton’s site. In the result I would dismiss the appeal.

[80] There are two aspects to the publication element of the tort of defamation. The first, relating to the defendant as publisher, concerns the act of promulgating the impugned item. The second, relating to the third party receiver of the impugned item, concerns the receipt of that item by a person within the court’s jurisdiction. (I refer to the issue of jurisdiction because publication, to be actionable, must be within this jurisdiction, and publication of internet material occurs where the words are read: *King v. Lewis*, [2005] E.M.L.R. 45, C.A.; *Gutnick v. Dow Jones*, [2002] H.C.A. 56.) In my respectful view, the reasons for judgment of my learned colleague mix these issues as one.

[81] The first of these two aspects is whether, by creating the hyperlinks in question, Mr. Newton can be seen to have promulgated a writing or message that is defamatory of the appellant. A near case was considered by this Court in *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, 42 B.C.L.R. (4th) 1. The issue in *Carter* was whether the defendant, in publishing a web address at which the allegedly defamatory material was contained, had re-published that material. Mr. Justice Hall, for this Court, in holding it did not, said:

[12] In my opinion, the factual situation here is closer to the situation found to exist in the New York cases of *MacFadden v. Anthony*, 117 N.Y.S. (2d) 520 (Sup. Ct. 1952) and *Klein v. Biben*, 296 N.Y. 638 (Ct. App. 1946), referred to by the trial judge, where the courts held reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment.

[82] While the circumstances of *Carter* differ from those before us, there is, in my view, no substantial difference between providing a web address and a mere hyperlink. Whether the hyperlink is a web address, as is often the case, or a more specific reference, both require a decision on the part of the reader to access another website, and both require the reader to take a distinct action, in the one case typing in a web address and in the other case clicking on the hyperlink. In other words, there is a barrier between the accessed article and the hyperlinked site that must be bridged, not by the publisher, but by the reader. The essence of following a hyperlink is to leave the website one was at to enter a different and independent website.

[83] Nor am I persuaded that in this era of rapidly changing technology we should assume access from a mere web address mentioned in an article will require any more effort than from a hyperlink. It is easy to contemplate a program whereby a click of a computer mouse engages a program on the reader's computer that effects the same result as a hyperlink. In other words, I agree with my colleague's conclusion at para. 58:

I agree with the trial judge that the reasoning of this Court in *Carter* supports Mr. Newton's position that the mere fact he hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites.

[84] I agree, as well, that the circumstances of a case may add more so as to demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents. For example, in *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), referred to in *Carter*, evidence of the defendant pointing to a placard with content was held to be sufficient evidence of publication to go to a jury. So a statement to the effect "N is described at [hyper link]" may itself incorporate a libel so as to be defamatory.

[85] In the case before us, the judge held concerning the context of the hyperlinks:

[32] In the present case, although hyperlinks referred the reader to articles now claimed by the plaintiffs to be defamatory, the plaintiffs agree 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.

[33] As the Court of Appeal observed in *Carter*, citing the proposition of the New York cases *MacFadden v. Anthony* and *Kline v. Biben*, “reference to an article containing defamatory content without repetition of the comment itself should not be found to be a republication of such defamatory content”.

[86] In these observations, in my view, the judge was entirely correct.

[87] My colleague considers that the judge did not fully explore the context of the hyperlinks in determining Mr. Newton had not participated in publishing the impugned articles. In her view the fact Mr. Newton’s article containing the hyperlinks deals with free speech and defamation, and the fact it refers to lawsuits involving Mr. Crookes, serve “as words of encouragement, or an invitation”, to look further.

[88] For clarity, the article on Mr. Newton’s website under the headline “Free Speech in Canada” said:

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](#).

[89] With respect, I see no encouragement or invitation from the fact the discussion concerns free speech and defamation. Nor, in my view, can reference to Mr. Crookes’ litigation reasonably have that effect. Those factors, at a minimum, alert the reader to the potential for untrue content or disputed commentary. They 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. It is not, as was suggested is sometimes the way in the recent case *Metropolitan Schools v. Google Inc.*, [2009] E.W.H.C. 1765 (Q.B.), a snippet from the article or a snippet produced by a search engine.

[90] On these considerations I conclude Mr. Newton was not a publisher because of his hyperlinks to the offensive article.

[91] The second aspect of publication is whether it can be inferred a person accessed the impugned articles by way of the hyperlinks. My colleague would conclude, from the fact of 1,788 “hits” of Mr. Newton’s article that at least one person within this jurisdiction, did so.

[92] In my view, the approach taken by my colleague to the effect that from the number of persons accessing Mr. Newton’s website it may be inferred that a person in this jurisdiction accessed the impugned articles by clicking on them, does not sustain scrutiny. In the context of internet life, we have no way to assess the volume of “hits” here compared to the norm, the usual behaviour of internet readers or “surfers”, or the jurisdiction in which they reside. The conclusion drawn by my colleague is, with respect, tantamount to a presumption that in the case of a website accessed to any significant extent, there has been communication of the offensive material. This is contrary to her conclusion on the issue of presumption, and one with which I do not agree. The conclusion effectively reduces the element of publication to the role of the publisher without consideration of the receipt of the impugned material. There may be cases in which more is known supporting such an inference, but such is not the case here where all that is before us is the bald number of hits. In my view there is an insufficient basis upon which to make such an inference, and the inference drawn cannot co-exist with the reasons for judgment on the matter of a presumption.

[93] Last, the appellant complains that Mr. Newton did not remove the hyperlinks when asked to do so. This is not a question considered by the judge, and findings of fact are not contained in the reasons for judgment to support a discussion of that interesting issue. But for my conclusion on the question of drawing an inference that a person clicked on the hyperlink, I would allow the appeal and remit this question to the trial court for determination. However, in view of my conclusion on the question of inference, I would dismiss the appeal.

“The Honourable Madam Justice Saunders”

I Agree:

“The Honourable Mr. Justice Bauman”

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crookes v. Newton*,
2009 BCCA 392err1

Date: 20090918
Docket: CA036623

Between:

Wayne Crookes and West Coast Title Search Ltd.

Appellants
(Plaintiffs)

And

Jon Newton

Respondent
(Defendant)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Bauman

On Appeal from the Supreme Court of British Columbia, Vancouver Registry,
Docket No S072729, 2008 BCSC 1424, October 27, 2008

Counsel for the Appellants: R.A. Kasting

Counsel for the Respondent: D.W. Burnett

Place and Date of Hearing: Vancouver, British Columbia
May 25, 2009

Place and Date of Judgment: Vancouver, British Columbia
September 15, 2009

Date of Corrigendum: September 18, 2009

Corrigendum to Written Reasons by:
The Honourable Madam Justice Saunders

Madam Justice Saunders:

[1] In my reasons for judgment released September 15, 2009 the second sentence of paragraph 84 is to be deleted. Paragraph 84 will now read:

I agree, as well, that the circumstances of a case may add more so as to demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents. For example, in *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), referred to in *Carter*, evidence of the defendant pointing to a placard with content was held to be sufficient evidence of publication to go to a jury. So a statement to the effect “N is described at [hyperlink]” may itself incorporate a libel so as to be defamatory.

The Honourable Madam Justice Saunders