Defamation 2.0

- By Karen Zimmer

Almost every individual and corporation in today's society is engaged in “publishing”, whether it be on websites, blogs, tweets, Facebook or various other social media forums.

There is a misconception that the law of defamation is not keeping up with internet publications. The more likely reality is that most internet publishers are failing to keep apprised of the risks of potential liability arising from their own internet postings and from simply exercising editorial control over websites, Facebook pages, and blogs.

Our Courts have been able to draw from a long line of jurisprudence to impose liability for defamatory postings on the internet in a similar fashion as they do for publications appearing in the traditional media. There is nothing about the technology that reduces potential liability.

Internet users may be surprised to learn that using a hyperlink to a website on which defamatory statements appear could result in liability in particular circumstances according to the recent British Columbia Court of Appeal decision in *Crookes v. Newton,* 2009 BCCA 392.

This case is perhaps a bit less astonishing when one considers the decision of *Hird v. Wood* (1894), 38 S.J. 234 (C.A.) made over a century ago. The Court in *Hird* found that the act of pointing people passing by to defamatory words on a sign was a sufficient act to constitute publication of the defamatory words on the sign. This conclusion was reached notwithstanding there being no evidence that the respondent was involved in writing the words or erecting the sign.

Hird was considered by our British Columbia Court of Appeal in *Crookes v. Newton.* At issue in *Crookes* was a commentary on free speech and the internet that referenced the plaintiff’s defamation action against a third party and hyperlinked readers to the article alleged to be defamatory.

Both concurring and dissenting appellate judges found that a hyperlink, depending on its content, could be a sufficient act of invitation or encouragement to view the impugned site, or an adoption of all or a portion of its content to constitute publication of that site. The justices differed on whether the facts in this case established that there was a sufficient invitation to view the defamatory content. The majority found that there was not a statement of approbation or adoption appearing with the hyperlink and that in the circumstances the hyperlink was more comparable to a footnote or an index card in a library. The Supreme Court of Canada has heard the appeal but has not yet rendered reasons.

The Court in *Crookes* considered and followed *Carter v. B.C. Federation of Foster Parents Association*, [2005] B.C.J. No. 1720 (C.A.). Our firm was counsel for the defendant Federation. Part of the claim included an allegation that distributing a hard copy newsletter which referenced a website address "for more news" constituted publication of the defamatory statements on that website. *Carter* distinguished *Hird* on the basis that the Federation did not take active steps to draw the attention of others to the actual defamatory statement appearing on the website and also did not have any element of control over the defamatory postings. The Court of Appeal upheld the dismissal of this part of the claim.

Internet users may also be surprised to learn that liability can arise for the defamatory postings made by a third party on their own website, Facebook page or blog if they become aware of the defamatory posting but fail to remove it.

This liability arises from old English cases in which defendants were found liable for "publishing" defamatory materials that were created and displayed by someone other than the defendant on premises controlled by the defendant. In such cases, where the defendant elected to leave the materials in a place over which he had control, the failure to remove the materials was a basis for liability. An example of such a case is *Byrne v. Deane,* [1937] 2 All E.R. 204 (C.A.) involving the words appearing on a notice board at a golf club.

The English court in *Godfrey v. Demon Internet Ltd.,* [1999] E.W.J. No. 1228 ruled that a defendant internet service provider ("ISP") that carried what is often referred to as a "newsgroup," was a publisher of defamatory postings on that newsgroup because it was aware of the defamatory posting but refused to remove it.

The prerequisite for liability is knowledge of the posting and the ability but failure to remove it. The English court in *Bunt v. Tilley,* [2006] EWHC 407 (Q.B.) found that an ISP which performs no more than a passive role in facilitating postings on the internet could not be deemed a publisher at common law.

The decision of *Carter* also addresses this issue. Part of the claim concerned the defamatory postings made by others on the Federation's online chat room. The Plaintiff demanded that the infringing materials be removed. The Federation had thought it had removed the postings only to learn two years later, after it received an Amended Statement of Claim, that the postings remained on the website.

The British Columbia Court of Appeal decided that the plaintiff was entitled to a remedy since the Federation failed to take effective steps to have the offensive materials removed in a timely way, and referred the claim to a full trial on that issue. The case never proceeded further.

In some circumstances, internet users can attempt to rely on the long established defence of "innocent disseminator." This defence is applicable to distributors such as libraries, bookstores, and news vendors, and requires a defendant to establish that: he was not aware of the defamatory statement contained in the publication; he did not know that the publication was of the type that would contain a libel; and, such want of

knowledge was not due to negligence on his part. This defence did not succeed in the *Carter* case as the Federation failed to remove the defamatory statements after being made aware of them.

Internet users cannot avoid liability by posting anonymously. A court application can be made to compel the ISP to reveal the identity of the anonymous poster. As was evident in *WeGo Kayaking Ltd. v. Sewid*, 2007 B.C.S.C. 49, an internet user also cannot avoid liability arising from a website over which he has editorial control by simply suggesting that he is not the domain name registrant for that website.

Because internet publications are widely disseminated, internet publishers are more vulnerable to high damage awards. An article on *Defamation and Damages* can be found on our firm's defamation blog (bcdefamationlaw.com). This article refers to cases such as: *Southam Inc. v. Chelekis* (2000), 73 B.C.L.R. (3d) 16 (C.A.) where an award of $875,000 was made against the defendants who defamed the plaintiff on the internet; *Newman v. Halstead,* [2006] B.C.J. No. 59 where $626,000 was awarded to eleven plaintiffs as a result of the defendant's vindictive internet campaign; and *Reichmann v. Berlin,* [2002] O.J. No. 2732 where the Plaintiff, who was a successful businessman, was awarded $400,000 as a result of the defendants alleging on the internet that he engaged in dishonest and dishonourable conduct.

Today's internet publishers would be wise to follow the practices of publishers in traditional media by having potentially sensitive materials vetted by an experienced libel lawyer and obtaining advice on how to limit risks arising from their specific type of internet publishing and editorial control exercised on the internet.

When faced with a threatened claim, internet publishers should promptly seek legal advice. A quick response can significantly reduce exposure to liability, reduce damages, or enable you to resolve a dispute before ending up in Court. Where appropriate, apologies or retractions should be considered.

This report was prepared by Karen Zimmer for Alexander Holburn Beaudin & Lang.

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