

Case Law Update: Crookes v Newton

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2011 SCC 47 (Released October 19, 2011)

Libel and Slander Hyperlinks Publication Innocent Dissemination

Newton owned and operated a website containing commentary about various issues, including free speech and the Internet. He posted an article on his website called "Free Speech in Canada". The article contained several hyperlinks to other websites.

Crookes argued that two of the hyperlinks connected to defamatory material. One link was a "shallow" hyperlink, which directed the reader to a home page that contained allegedly defamatory articles. The other link was a "deep" hyperlink that connected the reader to a specific article which Crookes alleged was defamatory.

Crookes demanded that Newton remove the article containing the hyperlinks from his website. Newton refused. Crookes then brought an action against Newton in defamation. The article containing the hyperlinks had been accessed 1,788 times. However, there was no evidence with respect to how many times the hyperlinks had been accessed, if at all.

At issue was whether a hyperlink constituted "publication" for the purposes of defamation law. Justice Abella, writing for the majority of the Court, found that it did not. She reasoned that reference to an article containing a defamatory comment without repetition of the comment itself should not be found to be publication or republication of the defamatory comment. Justice Abella found that making reference to the existence or location of content by hyperlink or otherwise, without more, is not publication of the content.

Justice Abella concluded that a hyperlink, by itself, should never be seen as publication of the content to which it refers. Therefore, the hyperlinks created by Newton were not defamatory.

Chief Justice McLachlin and Fish J. wrote separate reasons concurring in the result. They parted with Abella J. on the blanket statement that hyperlinks could never be defamatory. They reasoned that if the text surrounding the hyperlink indicates adoption or endorsement of the content of the hyperlinked text, it may be defamatory.

Justice Deschamps wrote separate reasons that ultimately concurred in the result with her colleagues, although she differed significantly in her reasoning. She found that creating a hyperlink could be defamatory if it made defamatory information readily available to a third party in a comprehensible form. Justice Deschamps also referred to the defence of innocent dissemination as an existing mechanism to protect freedom of expression.

On the facts of the case, Deschamps J. was not willing to find that the "shallow" hyperlink was enough to make the defamatory material readily available. However, she found that the "deep" hyperlink, which linked directly to the allegedly defamatory article, satisfied the condition of publication. She found that the action could not succeed, however, because there was no evidence that a

third party had accessed this hyperlink, and she was unwilling to draw an inference that a third party had done so.

Ultimately, the justices were unanimous in opining that the action by Crookes could not succeed. The appeal was dismissed.

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