

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Crookes v. Wikimedia Foundation Inc.***,
2008 BCSC 1424

Date: 20081027
Docket: S072729
Registry: Vancouver

Between:

Wayne Crookes and West Coast Title Search Ltd.

Plaintiffs

And

**Wikimedia Foundation Inc.
Anonymous #1, 2, 3, 4, 5, & 6, Domains by Proxy, Inc.
and Jon Newton**

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiffs:

Robert A. Kasting

Counsel for the Defendants,
Wikimedia Foundation Inc. and Jon Newton:

Daniel W. Burnett

Date and Place of Trial:

August 29, 2008
Vancouver, B.C.

[1] The plaintiffs sue the defendants seeking damages for defamation. This is a summary trial pursuant to Rule 18A of the ***Rules of Court*** in respect of the plaintiffs' claim against the defendant, Jon Newton.

[2] The plaintiffs allege they have been defamed in four articles on the internet which they characterize as a "smear campaign". Three of the articles were published on a website called www.openpolitics.ca ("openpolitics"). They are entitled "Wayne Crookes", "Friends of Crookes" and "Gang of Crookes". The fourth article, called "Wayne Crookes" appeared on the website www.usgovernetics.com ("usgovernetics").

[3] The plaintiffs have commenced five actions seeking damages for defamation against various individuals and organizations, including Yahoo!, Wikipedia and Google. The first action is against the alleged publisher of openpolitics. The trial of that action is scheduled to commence on October 20, 2008.

[4] The defendant Jon Newton operates a website called www.p2pnet.net ("p2pnet"). That website apparently contains commentary on issues surrounding the internet as well as other subjects.

[5] After the first of the five lawsuits was commenced, Mr. Newton published an article on p2pnet which comments on the implications of defamation actions for those who operate internet forums.

[6] The plaintiffs do not allege that Mr. Newton wrote or posted any defamatory words. His website article includes a hyperlink to openpolitics and to usgovernetics.

The plaintiffs' case is that posting hyperlinks to websites containing defamatory material constitutes publication of the defamatory words in the latter websites.

[7] Mr. Newton is not involved in any way with either the openpolitics or the usgovernetics website. He deposed that the articles in question concern internal issues in the Green Party of Canada. Mr. Newton's evidence is that he learned that the articles were the subject of defamation actions.

[8] According to Mr. Newton, he is not interested in the Green Party issues. Rather, his interest is in free speech and the internet. He posted a reference to the existence of the lawsuit and its implications for free speech on the internet. There was no comment about Mr. Crookes' character or integrity.

[9] The posting included hyperlinks to articles to which he was referring. He did not quote any of the allegedly defamatory words from openpolitics or usgovernetics. He expressed no view about Mr. Crookes.

[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.

[12] The defendant relies as well on the defences of fair comment and qualified privilege. His position is that those issues are not suitable for disposition in a summary way under Rule 18A.

[13] Are the plaintiffs required to lead evidence that persons actually followed the hyperlinks and read the words that are complained off?

[14] The plaintiffs' case is that publication is presumed. Publication is presumed where statements are made in books or newspapers or where they are broadcast to the general public: see ***Libel and Slander Act***, R.S.B.C. 1996, c. 263, ss. 7 and 12(2); and ***Taylor-Wright v. CHBC-TV***, [1999] B.C.J. No. 334 (S.C.), aff'd 2000 BCCA 629, 82 B.C.L.R. (3d) 50.

[15] The same presumption was implicitly accepted, say the plaintiffs, in ***Wiebe v. Bouchard***, 2005 BCSC 47, 46 B.C.L.R. (4th) 278. In that case, the offending words were posted on a Government of Canada website that was freely accessible to anyone with a computer and internet access.

[16] In ***Wiebe***, the issue before the court was whether it was appropriate for a British Columbia court to assert jurisdiction over the plaintiff's defamation claim. Although the court accepted that the disputed material was posted on the nationally accessible Government of Canada website, the court did not reach a final conclusion on whether there was publication.

[17] The presumption of publication was not made in another proceeding involving the same plaintiff. In ***Crookes v. Holloway***, 2007 BCSC 1325, 75 B.C.L.R. (4th)

316, Madam Justice Stromberg-Stein dismissed the action because there was no proof of publication:

[30] Publication is an essential element for an action in defamation. In this case, the pleadings are deficient as there is no pleading alleging the purported defamatory postings were published in British Columbia; that is, communicated to a third person: *Braintech Inc. v. Kostiuik*, [1999] B.C.J. No. 622, 1999 BCCA 169. There is no evidence anyone read the material in British Columbia and there is no basis for this court to draw that inference.

[18] The Court of Appeal upheld the decision, 2008 BCCA 165, 77 B.C.L.R. (4th) 201. The court distinguished the decision in *Wiebe*, noting that the factual circumstances were different. In *Crookes v. Holloway*, the website in question had restricted access. It was not freely available to the public. The court concluded that this was unlike a book or newspaper or television program or a Government of Canada website. The court said this:

[6] In *Wiebe* significance was attached to the fact the libellous statements were posted on the internet nationwide as well as being 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.

[7] Mr. Crookes also contends the judge erred in holding Yahoo had, without tendering any evidence in support, demonstrated there was no publication in British Columbia. But in my view, the judge reached no such conclusion. She observed Mr. Crookes' pleaded case was deficient and no evidence had been adduced on the application that the statements had been read in this province or that would permit an inference to that effect to be drawn. She held there

was no basis to find the proceedings concerned a tort committed in British Columbia such that the court was without jurisdiction. (*Crookes v. Yahoo*, 2008 BCCA 165).

[19] Unlike the website at issue in ***Crookes v. Holloway***, access to the p2pnet website is not restricted. However, p2pnet certainly does not have the national prominence and high visibility of a Government of Canada website, as was the case in ***Wiebe***. Although the degree of access permitted to a website may be a relevant factor in determining whether publication occurred, it is not determinative.

[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.

[21] In ***Griffin v. Sullivan***, 2008 BCSC 827, it was alleged that the defendant published defamatory words on the internet. The plaintiff in the present case argued that it was implicitly accepted in that case that the fact the words were printed on the internet amounted to publication. The plaintiffs point to para. 105 of that decision:

[105] Although the defamatory statements were published on the internet, it is impossible to say how many persons actually read any of them. Of those who did read at least some of them, it is unknown whether anyone actually believed any of the statements. It is also unknown whether anyone who personally knew the plaintiff read any of the defamatory statements.

[22] The English courts require substantial publication, something more than mere publication. Thus, in ***Amoudi v. Brisard***, [2006] EWHC 1062, [2006] All E.R. 294 (Q.B.), the court referred to ***Jameel v. Dow Jones***, [2005] EWCA Civ. 75, [2005] 2 W.W.R. 1614, where the Court of Appeal said there was evidence that five persons, including three members of the claimant's camp read the hyperlink and that that was too trifling to maintain an action. The court in ***Amoudi*** stated:

...I am unable to accept that under English law, a claimant in a libel action on an internet publication is entitled to rely upon a presumption of law that there has been substantial publication.

[23] One cannot determine from the reasons in ***Griffin v. Sullivan*** whether there was any evidence that persons read the impugned words. Publication was not an issue. Neither was it in ***Wiebe***.

[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.

[25] That brings me to the second issue, whether creating a hyperlink to defamatory material is publishing the defamation.

[26] In ***Carter v. B.C. Federation of Foster Parents Assn.***, 2005 BCCA 398, 42 B.C.L.R. (4th) 1, the Court of Appeal considered whether publication of a web address or "URL" in a newsletter constituted publication of the contents of the website. The Court of Appeal held that it did not. The court reasoned at paras. 11 to 13:

[11] In the course of his reasons, Taylor J. made reference to *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir. 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 (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.

[27] Thus, the court declined to rule on whether publication of an internet location by a hyperlink amounts to publication of the contents of the linked website.

[28] That is the question that arises squarely in the present case. I agree with the defendant that footnotes in an article are an apt analogy. 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.

[29] A hyperlink is like a footnote or a reference to a website in printed material such as a newsletter. 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.

[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”.

[34] I do not wish to be misunderstood. It is not my decision that hyperlinking can never make a person liable for the contents of the 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.

[35] I conclude that there has been no publication. The action is therefore dismissed.

"Mr. Justice Kelleher"