Internet Defamation Law: Update

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I. Introduction

The fundamentals of defamation, for the most part, have not changed in decades; the basic elements of defamation law are well settled. Modern modes of communication are however, causing the Courts to question whether traditional principles ought to apply in the context of internet defamation.

This paper is intended to provide the reader with an update and supplement to the 2010 Defamation Law CLE. It would not be possible to cover all aspects of defamation; consequently the focus is on updates in the context of the internet, including issues involving hyperlinks, Google and blogs.

This paper first presents a refresher, or for some, a primer, on the basic elements required to establish the tort of defamation. A review of post-2010 cases that illustrate developments in the law of defamation follows. The paper concludes with a summary of practical considerations in light of the courts’ recent decisions in cases of internet defamation.

The content is not intended to provide a comprehensive guide to internet defamation law, rather it is designed to bring awareness to potential new considerations for the lawyer faced with a defamation action in the “internet age.”

II. Basics: A Mini-Primer

As noted, there have been few if any major developments in the law on the basic elements of defamation. There is no shortage of cases available to provide the principles. Consequently, the cases cited in this section offer a variety of factual circumstances, and a starting point for more specific research.
A. Defamation: Slander or Libel?

The purpose of the law of defamation is to protect persons and corporations from the publication of false statements which could harm their reputation in the community.1 Defamatory statements may be published in orally or writing.

Slander is spoken or other transitory forms of communications. Sounds and gestures are examples. Special damages resulting from slander must be proven, unless the slander includes assertions that the plaintiff committed a crime, which is actionable per se.

Defamatory publications are usually classified as libel if published in the form of written, visible or audible word recorded in any form of a more or less permanent nature. These forms include letters, newspapers, films, or television and radio broadcasts. The key is the element of permanence. Libel is actionable per se; damages are presumed.

As noted, permanence is the element distinguishing slander from libel. In modern terms, “instant messaging,” “tweeting,” “blogging” and other forms of immediate communications, while they seem fleeting or short-lived, are permanent. Accordingly, the focus of this paper is libel and not slander.

B. Elements of Defamation

Defamation is for the most part a strict liability tort; defendants will be liable whether they acted intentionally or negligently in making and publishing a defamatory statement to a third person.2

In order to recover in an action for defamation, the plaintiff must show that the words about which the plaintiff complained of:

• are defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person;
• in fact refer to the plaintiff; and
• were published to a third person.3

I. Are the Words Defamatory?

The plaintiff must prove the words complained about are defamatory and were spoken or written by the defendant. It is a question of law whether the words are capable of a defamatory meaning. Whether the words we understood as defamatory is a question of fact.4

In determining the meaning of a publication, the court may take into consideration all of the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented.5

2 Dinyer-Fraser v. Laurentian Bank, 2005 BCSC 255.
4 Lions Gate Marketing Co. v. Used Car Dealers Assn. of Canada, 2005 BCCA 274 at para. 11.
The Court is not to select the harshest, most extreme, meaning, since the test assumes a reasonable and fair-minded audience rather than one that is looking to the question of the plaintiff’s reputation.\(^6\)

The standard of what constitutes “reasonable and fair-minded” person should be considered as one who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.\(^7\)

2. Identifying the Plaintiff

Typically, identification of the plaintiff is readily apparent and or express. If the plaintiff is not expressly named in the defamatory statement, the plaintiff must plead and prove that the publication was about the plaintiff. The test is an objective one: are the words used or the circumstances attending the publication such that a reasonable person would understand that the words refer to the plaintiff.\(^8\)

3. Publication and Republication by the Defendant

The plaintiff must establish that the defamatory words were published by the defendant. “Publication” occurs only where the defamatory matter is communicated to someone other than the person defamed.\(^9\)

Republication is when the person to whom the words were originally published communicates them to someone else. The general rule is that a person is responsible only for his or her own defamatory publications, and not for their repetition by others.

However, if the defendant authorized or intended the repetition, or was the “natural and probable result” of the defendant’s publication, he or she will be liable. In these circumstances, the plaintiff is entitled to recover damages from the defendant both for the original publication and for the republication.\(^10\) That said, the original publisher will be jointly and severally liable with those who repeat the defamatory words.\(^11\)

Once the plaintiff has established these elements, falsity and damage are presumed, and the onus shifts to the defendant to advance an appropriate defence to escape liability.\(^12\)

III. Updates: Post-2010

What has changed, if anything? The courts are being tasked with applying, and in some cases, stretching, traditional defamation law principles in modern factual matrixes. The three factors that appear to be most challenged in the context of internet defamation are the defamatory meaning, establishing publication, and jurisdictional challenges.

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6 Mainstream, a Division of EWOS Canada Ltd. v. Staniford, 2012 BCSC 143 at para. 112.
7 Mainstream, a Division of EWOS Canada Ltd. v. Staniford, 2012 BCSC 143 at para. 21.
8 Dinyer-Fraser v. Laurentian Bank, 2005 BCSC 255 at para. 159.
12 Up to date discussion of defamation defences are more than ably covered in papers prepared by Rhys Davies, QC of Davis LLP and by Daniel Burnett of Owen Bird for the 2010 Defamation Law CLE.
A. Defamatory Meaning

The threshold question of whether words posted on the internet were capable of defamatory meaning was the main issue in Baglow v. Smith, 2011 ONSC 5131, an Ontario case involving debating political bloggers.

Through a series of posts on various blogs, including their own, Smith and Baglow engaged in a fervent exchange about the validity of the trial of Omar Khadr. Despite the bloggers volleying a variety of caustic barbs at each other, without complaint, Baglow took exception when Smith blogged that Baglow was a supporter of the Taliban. Baglow sued Smith in defamation in the Ontario superior Court of Justice; the matter was determined on the defendant’s motion for summary judgment.

Mr. Justice Annis, decided that in the context of a political debate, the “sting” of the allegedly libellous words would be considered comment or opinion and not capable of defamatory meaning. This was primarily because reasonably informed readers of the blogs would properly understand that Smith labelled Baglow a Taliban supporter as a comment on weaknesses in Baglow’s arguments. The words were not, therefore, capable of lessening Baglow’s reputation and not defamatory.

Although satisfied that the words were not capable of a defamatory meaning, Mr. Justice Annis went on to consider the issue specifically in the context of internet blogs. He likened the blogging threads to live debates, a milieu in which the audience anticipates and receives the debaters’ responses to each other’s disparaging remarks. He suggested that derogatory, even defamatory remarks, are expected to be parried in a live debate. The audience predicts this type of exchange, which removes the “sting of the libel” and diminishes any threats of damage to reputation. This is a contextual factor that should be considered in determining whether a statement is defamatory. The plaintiff's case was dismissed; the words complained of did not clear the threshold test of whether the word were capable of defamatory meaning and, were not in any case defamatory, given the context. Therefore, there was no genuine issue for trial. If the words were capable of and were in fact defamatory, the defendants would be entitled to rely upon the defence of fair comment.

The plaintiff appealed. The Ontario Court of Appeal expressly considered the question of whether communications in the “blogosphere,” on Facebook or in the “Twitterverse” ought to involve different considerations by the court as between these forums and or in comparison to traditional media, noting that the issues had not been addressed in the jurisprudence in any significant way. The Court allowed the appeal, stating that the motions judge erred in deciding a relatively novel issue of internet defamation in the political blogosphere without a full factual record with cross examinations and expert evidence. In particular, a careful assessment was required of the view that the “reasonable reader” might take of Baglow’s reputation in the context of the exchange. A new trial was ordered but has not yet been reported (Baglow v. Smith, 2012 ONCA 407).

The outcome of this case could be important if it provides clarification of whether the factors to consider in regard to the “reasonable reader” test are or ought to be different in the context of internet defamation.

B. Publication

Readers will recall that the defamatory words must have been published by the defendant to a third party. Establishing who is a publisher of defamatory content on the internet has proven to be an issue. The following cases illustrate the courts’ considerations when deciding whether someone, other than the primary publisher, is a publisher.

1. Hyperlinks

Since the 2010 Defamation Law CLE, the Supreme Court of Canada has decided the appeal of Crooks v. Newton, 2011 SCC 47, a case that dealt with the issue of whether posting hyperlinks to defamatory material amounts to “publication” of that material. The essential facts are that Newton posted
hyperlinks in an article on his website that linked to other webpages containing comments about Mr. Crooks, which he alleged were defamatory. The Courts at each level emphasized a contextual approach in deciding the issue.

In the Supreme Court of BC, the summary trial judge, Mr. Justice Kelleher, dismissed Mr. Crooks’ claim. No evidence was adduced to establish that anyone followed the links, which would have established publication to a third party. Further, there was no basis on which to conclude that hyperlinks create a presumption of publication. Mr. Justice Kelleher likened hyperlinks to footnotes; by analogy, while a hyperlink provides immediate access to material published on another website, it is a reference to, but does not amount to republication of, the content on that site. Without republication of defamatory material on Mr. Newton’s website itself, in reference to the hyperlinked site, he had not “published” the hyperlinked defamatory comments (Crooks v. Newton, 2008 BCSC 1424).

Crooks appealed. The majority of the Court of Appeal dismissed Crooks’ appeal deciding that merely linking a website, without comment, encouragement or invitation to view the impugned comments, did not constitute publication. And, Newton’s website article did not include such comment or invitation. Further, the “number of hits” on Newton’s article was not sufficient for the Court to draw an inference that any third parties had followed the link to read the defamatory words. In dissent, Madame Justice Prowse found that in this particular case, Mr. Newton’s article did amount to an invitation to click on the hyperlink and, therefore, did constitute publication. Further, in her view, it was unlikely that no one had followed the hyperlinks to view the defamatory comments, given the number of hits. The trial judge erred in failing to draw an inference from this that Mr. Newton had “published” the hyperlinked content. She would have allowed the appeal (Crooks v. Newton, 2009 BCCA 392). Crooks appealed to the Supreme Court of Canada.

The Supreme Court of Canada considered whether it was appropriate to apply traditional defamation publication rules to establishing “publication” on the internet. Madam Justice Abella, writing for the majority of six judges, held that the act of simply referencing defamatory information, such as by a hyperlink, cannot constitute publication. This would engage a formulative application of the traditional rules that would find publication, for example, when a defendant left defamatory material where others could see it or by some other passive act that merely facilitated communication of defamatory material. To employ this traditional approach would create a presumption of liability for all hyperlinkers. Madam Justice Abella agreed that hyperlinks are, in essence, references; persons who communicate that something else exists, but do not communicate the substance, without more, are not publishers of the linked content. A factor in this reasoning is that the hyperlinkers have no control over the linked content. This approach accords more with the “dramatic transformation in the technology of communications” and with defamation law jurisprudence, which strives to balance protection of an individual’s reputation with freedom of expression. Further, hyperlinks are essential to providing a flow of information on the internet, which would be seriously restricted by the potential chilling effect on of subjecting them to traditional publication rules.

Madame Chief Justice McLachlin and Mr. Justice Fish agreed with the majority in the result, but formulated a different test. A hyperlink should be considered publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to. This is because, by endorsement or encouragement, the hyperlink ceases to be a mere reference; the defamatory content is in effect incorporated into the hyperlinker’s site.

Madame Justice Deschamps, concurring in the results, took the analysis further. She disagreed that a hyperlink, by itself, is always a passive conduit or mere reference. Further, the element of control over the linked content, as suggested by the majority, has never been a concept in the common law of defamation. Such a bright line rule does not lend itself to a full contextual analysis. The test should focus on satisfaction of two components: the plaintiff must establish, on a balance of probabilities, that:

- the hyperlinker performed a deliberate act that made defamatory information readily available to a third party in a comprehensible form; and
- a third party received and understood the defamatory information.
In this case, Madame Justice Abella found that Mr. Newton deliberately created the hyperlinks, making the defamatory material available. However there was nothing in the record indicating that anyone other than Mr. Crooks clicked on the hyperlinks; therefore the second prong of the test was not satisfied.

The Court appeared unanimous, however, as did the courts below, in acknowledging that evolving technologies are challenging traditional rules, and will continue to do so. The law must remain open to these challenges, adapting, incrementally, where the traditional rules do not easily fit into modern contexts.

2. Google

The “active participant” or “deliberate act” principles advanced by the Supreme Court of Canada in Crooks are mirrored in the following cases involving Google in other jurisdictions.

Whether Google was a publisher was the issue in an Australian case; Trkulja v. Google Inc. LLC, [2012] VSC 533. Mr. Trkulja had been the target of an attempted assassination. He subsequently sued Google because the results of a Google Images internet search of his name included his picture with text referring to Melbourne crime figures. Google argued that it was not a “publisher” as the search results were fully automated through search systems and algorithms. The Court disagreed, rejecting the argument on the basis that Google and its employees programmed the computer systems to carry out searches and display the resulting information; the results were precisely as intended by Google. This factored into distinguishing the case from authorities in other jurisdictions that stand for the proposition that an internet service provider will not generally be considered a “publisher” unless it is involved in actively selecting search results as opposed to being a “passive” information pipeline.

Whether Google published defamatory comments was again the issue in the English case of Tamiz v. Google Inc., [2012] EWHC 449 (QB). Mr. Tamiz, a former politician and a law student, attempted to sue Google Inc. over allegedly defamatory comments about him on the London Muslim blog, which was set up on Google’s proprietary “Blogger.com” platform. Mr. Tamiz had complained to Google, but it took Google five weeks to remove the posts.

The High Court ruled that Google could not be deemed a publisher in its own right because it was merely an “unfortunate owner” of the blogging platform and the five-week delay in removing the posts was “not outside the bounds of a reasonable response”. Mr. Tamiz’s action was dismissed in any case due to lack of evidence on whether third parties had in fact read the defamatory comments. Mr. Tamiz appealed.

The Court of Appeal disagreed on the issue of delay. Google was exposed to liability and deemed a “publisher” of potentially libelous posts on its Blogger platform due to its delay in removing the posts after receiving a compliant from Mr. Tamiz. Prior to Mr. Tamiz complaint, Google’s involvement could not be equated to that of a primary publisher, such as an author or newspaper editor; it did not have any prior knowledge of or control over the content. The delay, however “was sufficiently long to leave room for an inference adverse to Google Inc.” because it could then be said that Google had associated itself with or made itself responsible for the blog content. Google was, therefore, deemed a publisher. However, the Court dismissed the appeal, agreeing with the court below on the lack of evidence issue (Tamiz v. Google Inc., [2013] EWCA Civ 68).

C. Jurisdiction

“Libel tourism” is a buzzword frequently associated with jurisdiction issues in connection with internet defamation cases. Canada is said to have plaintiff-friendly defamation laws, the UK is known for large damages awards, and it is considered more difficult to make out a case of defamation in the US. The recent Supreme Court of Canada decisions in the companion cases of Breeden v. Black,
2012 SCC 19 and Éditions Écosociété Inc. v. Banro Corp., 2012 SCC 18, indicate the Court’s apparent willingness to depart from the traditional *lex loci delicti* rule, which could curb libel tourism in Canada.

In *Breeden v. Black*, the Supreme Court of Canada considered whether a Canadian court should assume jurisdiction over a defamation action that has a strong connection to the US.

Lord Conrad Black commenced proceedings against Hollinger International Inc., an American company, in the Ontario Supreme Court. Lord Black claimed that Hollinger directors and executives defamed him by posting certain press releases on the Hollinger website, questioning the legitimacy of certain payments Lord Black received during his tenure as Hollinger chairman. Hollinger applied for a stay on the basis that the action was not sufficiently connected to Ontario and should be tried in the US, the jurisdiction where Hollinger’s headquarters were located. The Ontario Supreme Court dismissed the application. Hollinger appealed; the Ontario Court of Appeal dismissed the appeal.

Hollinger appealed to the Supreme Court of Canada. Mr. Justice Lebel writing for a unanimous Canada agreed with the courts below, dismissing the appeal. In considering whether there was a real and substantial connection to Ontario, and therefore the Ontario court could properly assume jurisdiction over the action, Mr. Justice Lebel noted the issue was easily resolved. The tort occurred in Ontario where the defamatory material on the Hollinger website was published (i.e., read, downloaded and republished). This established the presumptive connecting factor to Ontario, satisfying the test for a real and substantial connection and therefore for the Ontario court to assume the jurisdiction.

In determining whether Ontario court should nonetheless exercise discretion to decline jurisdiction on the grounds that another jurisdiction is clearly the more appropriate forum, Mr. Justice Lebel discussed the implications of the rule that the place of publication in defamation cases established the place of the tort. He acknowledged that in the context of internet defamation, the tort could be committed in any number of jurisdictions and by the same token, foreign plaintiffs could commence actions in Canada to take advantage of Canada’s “plaintiff friendly” defamation laws.

Among the factors considered at this, the *forum non conveniens*, stage of the analysis is the law that would apply to the proceedings. In Canada, *lex loci delicti*, or the place where the tort occurred, is the general principle for determining the choice of law for torts. Referencing his decision in the companion case of *Éditions Écosociété Inc.*, Mr. Justice Lebel indicated that libel tourism might be deterred if the traditional *lex loci* rule was abandoned in favour of the choice of law being determined on the basis of where the most harm occurs. It is clear that the harm is not the publication of the defamatory material itself; the harm is the injury to the plaintiff’s reputation. Given the importance of the place of reputation, which has long been recognized in Canadian defamation law, the law of the place of the most substantial harm (to the plaintiff’s reputation) could be the more appropriate choice. This would restrict the choice of available law available to foreign plaintiffs and therefore, forum shopping.

The Court noted that this approach had already been adopted in Australia in direct consideration of deterring forum shopping in internet defamation cases.13

In Lord Black’s case and in *Éditions Écosociété Inc.*, whether the place of the tort or the place of the most substantial harm to reputation analysis was applied, the results were the same; the law of Ontario was applicable.

While not deciding on the issue in these two cases, Mr. Justice Lebel noted that the Court had previously left the door open for choice of law exceptions for torts, such as defamation. This would constitute an important development in defamation law in Canada, leaving the typical libel tourist without the strategic benefit of suing in Canada as the law of their own jurisdiction would apply. While not commented on directly, this development could also pave the way to make it easier for Canadians to sue foreign defamers in Canada.

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Of note, the UK recently enacted legislation aimed to curb libel tourism; the *Defamation Act 2013*, 2013 c.26 received Royal Assent on April 25, 2013. Among other terms, the new *Act* requires companies and individuals to show serious harm to establish a claim. Further, the legislation establishes a tighter test to bring claims involving those with little connection to England and Wales in the UK courts.

**IV. Practice Considerations and Concluding Remarks**

The message evolving from Canadian courts and other jurisdictions appears to be acknowledgment that evolving technologies are challenging traditional rules, and will continue to do so. The law must remain open to these challenges, adapting, incrementally, where the traditional rules no longer fit into modern contexts.

From a practice perspective, the courts’ apparent willingness to adapt as technology advances could open the door to allow previously questionable claims and defences to succeed. The recent internet defamation issues discussed in this paper suggest, in my view, that the following should be considered when faced assessing an internet defamation case:

- The context of publication is critical. The threshold test for defamatory meaning in terms of the “reasonable reader” could be equally stretched or challenged in light of the new and novel circumstances presented by instant and global access to communications.

- It appears the test to determine who is a “publisher” is in flux. Careful attention should be paid, again, to the context; whether the alleged defamer actively encouraged or invited readers to view defamatory content appears key, unless you are an internet service provider.\(^{14}\)

- In terms of jurisdiction, the place of the plaintiff’s reputation could prove a more important factor with the Supreme Court of Canada’s apparent openness to stray from the *lex loci delicti* rule. In the result, Canadian plaintiffs could have an easier time obtaining judgment in Canada, and conversely, foreign plaintiffs are less likely to have success suing in Canada if Canadian law is not available to them.

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\(^{14}\) Readers should note that other jurisdictions, including the UK and Australia, have enacted legislation that protects ISPs within certain parameters. In the US, ISPs’ liability for their users’ defamation is expressly limited by the *Communications Decency Act of 1996*, Pub. L. 104-104, title V, Feb. 8, 1996, 110 Stat. 133.