

B.C.'S COURT OF APPEAL CLARIFIES THE LAW ON DAMAGES ASSESSMENT THROUGH HYPERLINKS

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In [Pineau v. KMI Publishing and Events Ltd.](#), the British Columbia Court of Appeal clarified that sharing links to one's own defamatory article can have a significant impact on damage assessments. Given the widespread use of social media platforms by businesses and individuals to share content, caution must be used.

Background Information

The appellant, Stephen Pineau, became the CEO of Viscount Systems Inc. ("**Viscount**") in 2001 before he was terminated without cause from the position in 2014. Later that year, Viscount commenced a civil proceeding against Mr. Pineau alleging that he had used Viscount's corporate account to cover expenses that did not have a clear business connection. Mr. Pineau filed a response to civil claim denying the allegations, and a counterclaim seeking damages for wrongful dismissal and breach of employment contract. Two articles about the action were published in the magazine *Business in Vancouver* in 2014 and 2015.

The respondent, Nicola Middlemiss, is a journalist who was working for the respondent KMI Publishing and Events Ltd. ("**KMI**"), the publisher of *Human Resources Magazine*, an online and monthly print magazine. In early 2015, Ms. Middlemiss prepared an article focused on the lack of corporate "whistleblowers" in Canada compared to other jurisdictions following the second article published about Viscount's civil action against Mr. Pineau in *Business in Vancouver*. She did not make any reference to the appellant's response to civil claim or counterclaim. In addition to the publication, Ms. Middlemiss also provided a hyperlink to the article in an email and twitter posts, and sent the hyperlink to subscribers of KMI's online newsletter.

The BC Supreme Court's Decision

In an application for summary judgment, the Court found that the content of Ms. Middlemiss' article was defamatory. However, the quantification of damages was assessed at trial, in which the trial judge awarded general damages of \$60,000. The trial judge considered factors relevant to the damages calculation including the appellant's position and standing, the impact on the appellant, the nature of the libel, the mode and extent of the publication, the economic loss and loss of opportunity, the absence of an apology and the conduct of the defendant.

The BC Court of Appeal's Decision

Mr. Pineau appealed the decision and at issue was the trial judge's analysis regarding the mode and extent of publication where the trial judge cited *Crookes v. Newton*, 2011 SCC 47 ("**Crookes**") in determining that publication of a hyperlink to a libelous statement does not itself constitute publication of the libel.

The appellant argued that the trial judge made legal errors in his assessment of damages. Particularly, the appellant argued that the trial judge failed to consider the respondents' circulation of the defamatory article by hyperlink in assessing damages.

The Court of Appeal distinguished *Crookes* to find that the trial judge erred in law in limiting his assessment of the mode and extent of publication.

In *Crookes*, the defendant published on a website he owned and operated, a hyperlink to a defamatory third-party article, which in turn contained allegedly defamatory material about the plaintiff. The Supreme Court of Canada held that merely referencing the existence and/or location of content by hyperlink, is not in itself publication of that content. Although the person who referenced the existence and/or location of a publication may expand the audience for the defamatory publication, their participation is ancillary to that of the initial publisher.

However, in this case, Ms. Middlemiss and KMI directly circulated a hyperlink to a defamatory article they created. *Crookes* does not stand for the proposition that a defendant's conduct in increasing the circulation of their own defamatory publication via the transmission of a hyperlink is irrelevant to the assessment of damages.

Therefore, the Court of Appeal determined that the trial judge excluded from consideration the respondents' circulation of hyperlinks to the defamatory article through newsletter, email and tweets, along with a provocative "teaser" for the recipients to read the linked article. The Court of Appeal substituted award for an award of \$120k in general damages.

Takeaway

In internet defamation cases, extra caution must be exercised as sharing one's own defamatory article through hyperlinks can increase the quantum of damages. Provided that liability in defamation has been established, the action of circulating the defamatory publication to a broader audience is a relevant factor to be considered in assessing damages.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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