

LEADERSHIP UPDATE

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Canada: Developments In Internet Law: Defamation And Hyperlinks

By Gregory Bordan, Norton Rose OR LLP

The Supreme Court of Canada has advanced both defamation law and Internet law in its recent decision in *Crookes v Newton*,¹ released on October 19, 2011. The court, by a majority of six judges, held that a person cannot defame someone merely by publishing a hyperlink to a third party's website or document containing defamatory material: "... a hyperlink by itself, should never be seen as a 'publication' of the content to which it refers."² "Making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content."³

**Being
defeated
is often a
temporary
condition.
Giving up is
what makes
it permanent.**

**—Marilyn
vos Savant**



The majority compares hyperlinks to footnoted references in a paper document. Even though hyperlinks, unlike footnotes, offer immediate access to the third-party sites to which they refer, readers know that in following the link they are being referred to a different source. The majority expressly refrains from deciding whether the conclusion should be different in the case of embedded or automatic hyperlinks.

Rebalancing protection of reputation and freedom of expression

Under previous defamation case law, a hyperlinker who unwittingly linked to defamatory material could raise a defence of “innocent dissemination,” as well as other standard defamation defences. However, following *Crookes* a mere hyperlink is not publication and therefore no defence is required.

The majority holds that hyperlinkers can attract liability only if they *actually* present content from the hyperlinked material in a way that repeats the defamatory

content, or if they use a reference in a way that, *in itself*, conveys defamatory meaning. This is presented as a further step in the development of defamation law in which the recent trend in Canada has been toward limiting what constitutes publication. According to the majority, this reflects the court’s greater recognition, post-Charter, of a need to balance protection of an individual’s reputation with the public’s interest in protecting freedom of expression.

The majority decision appears to be driven by a concern over a possible chilling effect on the functioning of the Internet should mere hyperlinking expose the hyperlinker to liability for defamatory content of material over which the hyperlinker has no control. In a revealing paragraph, Justice Abella writes:

The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential “chill” in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for

linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning.⁴

Proliferating online defamation

The decision significantly reduces the risk of someone being held liable for defamation by linking to a site found to contain defamatory material. However, from the perspective of parties being defamed, this decision is likely to make it more difficult to put an end to the proliferation of defamatory statements and to seek redress for defamation. A person who has been defamed may, of course, take action against the author/publisher of the defamatory material. However, it is not unusual for defamatory material to be posted anonymously, in practice making legal redress against the author difficult or impossible. As well, a defamatory posting may initially have very limited reach, but that reach can be greatly amplified through hyperlinking from other sites. Under the majority decision, a defamed party would have no right of action against the hyperlinkers even if the latter are fully cognizant of the defamatory content of the posting to which they have linked.

The majority prefers the apparent certainty offered by a clear rule over the greater uncertainty inherent in either of the approaches proposed in the two concurring opinions.



Both those opinions would require a court to inquire into the intentions of hyperlinkers, determined on the facts of the case.

Unresolved issues

It remains to be seen whether the line drawn by the majority is as clear as may initially appear and whether the equities of future cases may yet force a more nuanced test. For example, the majority in *Crookes* leaves open the possibility that its holding might not apply to automatic links that operate without the intervention of the reader. Yet it may ultimately prove difficult to justify a radically different result, or at least test, based on whether a reader has clicked on a link or not.

Interestingly, *Crookes* does not at all address the issue of quantum of damages in a successful defamation suit. How will future courts deal with a situation in which a person is successfully sued for defamation based on a posting intended for a very select audience but in which the posting unexpectedly ends up being widely viewed through numerous third-party links? Will the author be liable for all the consequences of a posting that unexpectedly goes viral? Will all those who knowingly link to the posting escape liability despite their deliberate acts in making the defamatory material widely known? In such cases, courts may feel inclined to prefer the concurring opinion of the two judges who would allow a finding of liability

where the creation of a hyperlink, understood in its context, constitutes an adoption or endorsement of the defamatory material to which it links.

It also remains to be seen what influence *Crookes* exerts in other, arguably analogous, areas. For example, it has previously been held that it is a violation of a publication ban to distribute a hyperlink to a website publishing banned matter.⁵ In the future, will courts apply *Crookes* and arrive at a different conclusion, or will they limit *Crookes* to defamation cases despite the seemingly similar issues that arise?

In short, rather than definitively settling the issue of hyperlinks and defamation, *Crookes* will likely generate a new set of questions and spawn new litigation.

Court flexibility

Finally, this decision demonstrates the flexibility the court brings to the analysis of the legal significance of hyperlinks, responding to the context and legal issues at stake. For example, in *Dell Computer Corp. v Union des consommateurs*,⁶ the court considered whether terms and conditions available online through a hyperlink should be considered part of the original document or as an “external clause” within the meaning of Quebec’s Civil Code. The court held that a readily visible hyperlink to terms and conditions can make the latter sufficiently available to the reader that they are considered part of the original

document. The court remarked that there is “no real distinction between scrolling through a document and using a hyperlink.” The difference in the treatment of hyperlinks in *Dell* and *Crookes* is a function of the difference in context and the legal issues at play. We expect that future decisions will continue to draw distinctions adapted to the context and issues at stake, rather than applying any theory specific to hyperlinks.

Notes

1. *Crookes v Newton* [2011] SCC 47
2. *Crookes supra*, para 14
3. *Crookes supra*, para 42. Justice Abella wrote the majority decision on behalf of six justices. Chief Justice McLachlin and Justice Fish agreed with the majority that a mere general reference to a defamatory website is not enough to constitute publication of the defamation. However, they consider that there might be publication if, analyzed in its context, the use of a hyperlink constitutes adoption or endorsement by the hyperlinker of the defamatory content to which it links. Justice Deschamps, concurring in the result, held open the possibility of finding publication of defamatory material where the hyperlinker performed a deliberate act that made defamatory information readily available to a third party in a comprehensible form.
4. *Crookes supra*, para 36
5. *Toronto Airport Christian Fellowship v Kambulow* [2008] OJ No 1476 (Ont Sup Ct J)
6. *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801

Learning Is Created by the Learner

Betty K Garner, EdD

“Why don’t they get it?” This is the question dedicated teachers often ask. Even after we have tried every available approach to help students learn, some students still have that blank look. Now there is hope. Instead of doing more of what we have been doing for years, here is an opportunity to take a different approach. We can be the best teachers in the world and use all of the technology and resources available, but the students are the only ones who can input and process information for meaning. Learning is created by the learner.

In our fast-paced lives, we often assume that students have the basic cognitive structures to make sense of what we are presenting in class. Cognitive structures are the mental tools for making sense of information. Children are born with an innate ability to learn. However, we cannot assume that they have developed the ability to be reflectively aware of what their senses are telling their brains or the ability to use logical reasoning to solve problems, to transfer and apply what they are learning. Many of our students are over-stimulated by media that short-circuits their ability to transform sensory input into the mental representations they need to process data for meaning. For example, the teacher talking becomes background noise rather than the focus of attention. Curriculum content

becomes “stuff” to remember for tests rather than valuable knowledge to integrate with every area of study and make one a better person by informing life’s choices and purpose. Doing school work becomes one minor part of multitasking or social networking.

If we are to engage students in learning, we have to understand how to use curriculum, activities and assessments to help them develop the basic cognitive structures they need to become effective self-directed learners. For example, when presenting a lesson, start with content-related artifacts, manipulatives, pictures, worksheets or graphics. Ask students, “What do you see?” (which encourages them to suspend judgment and gather sensory data) and “What do you notice?” (which encourages them to interpret what they are seeing by making connections with prior knowledge and experience, and to look for patterns and relationships). At first they will try to guess what you want them to see or notice. When you accept their responses and encourage them to trust their own senses, they will become “detectives” and notice things you never thought of. This simple step invites students to bring something to the lesson, to invest in their ability to gather sensory data. It stimulates their cognitive engagement and gives you an idea of their vocabulary and interests, which you can integrate into the lesson to make it more relevant and meaningful.

The mind can only process data provided through the senses; therefore, helping students gather information more effectively enhances their ability to create meaning. Once students are reflectively aware of sensory input, they can visualize the information. That is, they can make a mental representation—take it from the

outside to the inside of their minds and make it their own. This makes it possible for them to then begin using their cognitive structures to process the data by creating connections, comparing, classifying, organizing for recall, integrating, synthesizing and applying the information.

The more we know about cognitive structures and how to help our students develop them, the more effective we are at equipping them to create meaning for themselves. In future articles, I will discuss some of the basic cognitive structures.

Last November, at the Leadership Essentials for Administrators Conference, I had the privilege of working briefly with ATA members. After the keynote address about cognitive structures, one participant wrote, “Fabulous! This has just whetted my appetite—the cognitive structures give the teachers a framework for their observations and scaffolding of student learning.” Another wrote, “Wow! This makes total sense to me. I need to ask better questions of my students and give them more time to process. Before the presentation, I believed that students created their own meaning to learn, but I didn’t have good tools to help them. I want to learn more. Thank you!” Another said, “Lifelong learning for all, especially my special education kids. I want to present this to my staff so that we can use it in understanding how and why we teach the way/what we teach.”

At the Educational Leadership Academy in Banff, July 9–13, 2012, Garner will present in-depth training in this cognitive research to help teachers help students become more effective learners.

Teacher Growth, Supervision and Evaluation

Teacher Growth Supervision and Evaluation Policy 2.1.5 reflects a professional model based on teacher growth rather than teacher deficiency. The policy takes seriously the professionalization of teaching, in which all teachers are responsible for students' learning within a model of collegial collaborative work and share teaching practices in professional learning communities. This two-day workshop reviews this policy and the school administrator's role in the teacher growth, supervision and evaluation process.

You are invited to attend.

Teacher Growth, Supervision, Evaluation and Practice Review Workshop

February 6–7, 2012, in Edmonton, at Barnett House

If you are interested in attending, please e-mail Marilyn Terlaan, in Member Services, at marilyn.terlaan@ata.ab.ca.



Q & A

GORDON THOMAS
Executive Secretary

Q: Should we complete School Bus Daily Trip Inspection checklists? These are a 45-point checklist that has now become an Alberta Transportation requirement and must be completed on a daily basis before the bus/van can be driven.

A: The Association is concerned that by taking on extra duties—such as vehicle inspections—that are not responsibilities of teaching, teachers expose themselves to increased risks that may affect their employment and expose them to potential legal action. With additional duties come obligations; with obligations come increased legal and employment risks. In the interest of the safety of students, these vehicle inspections should be undertaken by qualified personnel. Teachers do not have this expertise. So, do not sign these documents because you are not qualified to do vehicle inspections. Leave the transportation of students and vehicle inspections to the experts. This is not part of a teacher's job. Why put yourself and students at risk?

To find archived issues of *Leadership Update*, go to www.teachers.ab.ca and click on Other Publications (under Publications), then go to School Administrators.

Feedback is welcome. Please contact Konni deGoeij, associate coordinator, administrator assistance, Member Services, at konni.degoeij@ata.ab.ca.



To Do or Not To Do

Administrators' Legal Obligations to Students, Teachers, Parents: School Safety

The Alberta Teachers' Association (ATA) is offering school administrators and central office administrators a full-day seminar on school safety and the related legal obligations.

School administrators work within a complex set of employment, professional and social parameters set out in various laws, regulations and policies. As a result, administrators need a basic understanding of how the law affects them and those with whom they interact every day—students, teachers, central office staff and parents.

This seminar is designed to familiarize administrators with their legal obligations. Presenters from the ATA and its legal counsel, Field LLP, will provide information about the following issues within the framework of the law as it is today:

Conduct and Competence

- Code of Professional Conduct
- *Teaching Profession Act*
- ATA teacher discipline cases

Disclosure of Information

- *Youth Criminal Justice Act*—federal
- *Youth Justice Act*—provincial
- Alternative measures
- Records management

Dealing with Difficult People and Difficult Issues

- Harassment vs defamation
- *School Act* section 27 and its application
- Use of technology and "fair comment" statements

Seminar Details

When: April 18, 2012,
program from 9:00 AM to 3:30 PM

Where: Barnett House, Edmonton

Meals: A hot, buffet-style breakfast will be available from 8:15 to 9:00 AM. Lunch will also be provided.

Find out more: For more information contact Leslie Kaun at 780-447-9410 (Edmonton) or 1-800-232-7208 (elsewhere in Alberta); e-mail: LISA@ata.ab.ca.

Register online at:

www.surveymonkey.com/s/LISA2012

Registration

There is no charge for registration for members holding the highest level of Association membership available to them. For those to whom this is not applicable, registration for a fee is available and can be arranged directly with Leslie Kaun (contact information above).



BANFF LEADERSHIP SEMINAR

Leadership Development for Action on Inclusion

Sponsored by the Council on School Administration (CSA) of the Alberta Teachers' Association. CSA is proud to present Dr George Theoharis, author of *The School Leaders Our Children Deserve: Seven Keys to Equity, Social Justice, and School Reform*.

March 22 and 23, 2012
Banff Park Lodge, Banff, Alberta

Leading Equitable and Inclusive Schools

This two-day multimedia workshop will provide participants with practical strategies for creating and maintaining equitable and inclusive schools. Theoharis draws upon his own experiences and those of other educational leaders who have been successful in creating equitable and inclusive schools in their district. The first day will focus on the role of the school leader, and the skills and strategies leaders need to carry out work in the area of equity and inclusion; the second day's focus will be on how to create inclusive classrooms, schools and districts. Both days will give participants the information they need to create their own equitable and inclusive learning environment.



About George Theoharis

George Theoharis is associate professor in educational leadership and inclusive elementary education in the Department of Teaching and Leadership at Syracuse University, Syracuse, New York. He has extensive field experience in public education as a principal and as a teacher. George teaches classes in educational leadership and elementary/early childhood teacher education. His interests and research focus on issues of equity, justice, diversity, inclusion, leadership and school reform. He has published articles in such journals as *Teachers College Record*, *The School Administrator*, *Educational Administration Quarterly*, *Educational Leadership* and *Equity & Excellence in Education*. His new book, *The School Leaders Our Children Deserve: Seven Keys to Equity, Social Justice, and School Reform*, is about school leadership, school reform and social justice.

Wednesday, March 21, 2012

7:00 pm – 9:00 pm Conference registration

Thursday, March 22, 2012

7:00 am – 8:45 am Conference registration
Breakfast

9:00 am – 3:00 pm General session with George Theoharis
5:30 pm Pub night at St James's Gate Olde Irish Pub
(hors d'oeuvres and first drink included)

Friday, March 23, 2012

7:00 am – 8:45 am Breakfast
9:00 am – 3:00 pm General session with George Theoharis
3:00 pm – 3:15 pm Conference closure

Conference fees for two-day seminar

(includes a copy of *The School Leaders Our Children Deserve*, two buffet breakfasts, two buffet lunches and four refreshment breaks.)
CSA members: \$325.00 per delegate
Non-members (includes one year membership in CSA): \$375.00
Those ineligible for ATA membership or who chose non-membership: \$650.00

Register online for the Banff Leadership Seminar at www.event-wizard.com/events/LeadershipSeminar.

Make your reservation at the Banff Park Lodge Resort Hotel and Conference Centre today.

Call 403-762-4433 or toll free 1-800-661-9266
Conference room rates per night (not including taxes)
Superior room: \$128.00 Deluxe jacuzzi room: \$188.00
Executive, parlour or lodge suite: \$248.00

Who should attend? Education leaders, administrators, teachers, inclusive learning coaches, division office personnel.
Don't miss this great opportunity. Register today as an individual or as a team!
For more information, call the conference director, Garnet Goertzen, at 780-459-3990 or e-mail garnetg@gmail.com.



2012 EDUCATIONAL LEADERSHIP ACADEMY

presents

Getting to “Got It”: Helping Students Learn How to Learn

with

Dr Betty Garner

Dr Betty Garner challenges educators to take a fresh look at learning as a creative act of the learner. She is known for her ability to help students learn how to learn. Students experiencing difficulty with reading, math, or remembering or following directions, or who are lacking in motivation, attention and participation, need to be equipped with the basic cognitive structures to process information for meaning. They need to develop their “metability,” the dynamic process of learning, creating and changing, to learn how to learn for life.

Banff Park Lodge, Banff, Alberta

July 9–13, 2012

Who should attend?

- Principals and assistant/vice-principals
- School-based leaders in all fields
- Department heads
- Central office personnel
- Consultants
- Counsellors
- Teachers aspiring to educational leadership

- A program for those who hold or aspire to leadership positions in schools





2012 EDUCATIONAL LEADERSHIP ACADEMY

Program overview

Sessions will focus on practical suggestions for using Dr Garner's approach in planning and implementing daily lessons to stimulate cognitive engagement and on how administrators can improve the instructional practices of their teachers with the goal of enhancing student achievement. Specific topics will include the following:

- Offering early intervention and coaching for students who don't "get it," even after modifications and alternative methods have been used
- Preventing learning problems by equipping students with cognitive tools for gathering, processing and using information presented in class
- Helping students become more aware of their own cognitive processing when they encounter unfamiliar information or have to deal with change
- Using effective questioning to stimulate self-reflection, lesson analysis and collaboration between teachers and students
- How learning and behaviour are affected by the relationship between cognitive processing and emotional influences

What is the format?

The Academy is an intensive, five-day, in-residence program that requires the direct and sustained involvement of all participants to achieve the greatest benefit. Sessions run daily from 9:00 AM to 8:30 PM (with a two-hour dinner break) and participants are asked to commit to full participation in all sessions.

Mission Statement: The mission of the Educational Leadership Academy is to improve the quality of learning through effective leadership, to promote the professional growth of educational leaders and to build successful relationships.

Is university credit available for this Academy?

Participants must make arrangements, in advance, directly with their respective Alberta university.

Registration details

The registration fee is

- \$1,150 (includes GST) for members of the ATA holding the highest level of membership available to them and
- \$2,300 (includes GST) for non-members of the ATA, or for those who do not hold the highest level of ATA membership available to them.

The fee includes tuition, a resource book, five nights' accommodation (shared room) (July 8–12) and breakfast and lunch each day. Single occupancy accommodation is available for an additional fee of \$550 (including GST).

Space is limited; early registration is recommended.

Register online at <https://event-wizard.com/events/ELA>.

Cancellation policy

- Up to two weeks prior to the start of the Academy, \$100 of the registration fee is nonrefundable.
- No refunds will be issued for cancellations received within two weeks of the start of the Academy.

For additional information contact Leslie Kaun at 780-447-9410 (Edmonton) or 1-800-232-7208 (elsewhere in Alberta); e-mail: ELA@ata.ab.ca.

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