Singapore Journal of Legal Studies
[2024] 223–252

DEFAMATION BY HYPERLINKS – BACK TO BASICS?

Ezra **Lim** Pin*

The speed at which hyperlinks enable information to be disseminated poses challenges to legal regulation. In particular, major concerns arise over whether adherence to the Traditional Publication Rule would result in widespread liability. This paper explores how various jurisdictions have opted to tackle the issue of defamation *via* hyperlinks and highlights a shift towards a publisher-centric inquiry. This paper concludes by arguing that this shift is fundamentally at odds with the principles underlying the element of publication, and provides suggestions for how Singapore can consider approaching this issue moving forward.

I. Introduction

With the rise in global usage of the Internet,[1] defamatory content can now be shared with remarkable ease, often at break-neck speeds. In particular, hyperlinks have revolutionised what we say, whom we say it to, and how we say it.[2] In the 2011 landmark judgment of *Crookes v Newton* ("*Crookes*"), the Canadian Supreme Court considered whether a hyperlink could constitute publication for defamation.[3] In the different judgments handed down by the different judges, modifications were proposed to the Traditional Publication Rule,[4] illustrating an upspoken consensus that the traditional principles of the law of defamation were not sufficiently robust to keep up with the changing times. More than a decade on, courts in other jurisdictions have had an opportunity to consider the various approaches in *Crookes*.[5] This resulted in the development of many new approaches, and a slew of complicated requirements alongside them. This paper thus aims to provide an overview of the approaches that have been developed in different jurisdictions and highlight a

---

* LLB '24, Singapore Management University. This article was originally written as a directed research paper during the author's third year studying at the Yong Pung How School of Law. The author would like to thank his project supervisor, Assistant Professor Jerrold Soh, for his invaluable suggestions and guidance in the writing of this paper. The author is also grateful for the helpful comments of Professor Gary Chan and the anonymous referee. This article is written in the author's personal capacity, and the opinions expressed in this article are entirely the author's own views. All mistakes and omissions remain solely the author's.

1 Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SAcLJ 694 at [2].

2 Anjali Dalal, "Protecting Hyperlinks and Preserving First Amendment Values on the Internet" (2011) 13(4) U Pa J Const L 1017 at 1036.

3 *Crookes v Newton* [2011] 3 SCR 269 (SC, Can) [*Crookes*].

4 *Ibid*.

5 See Part III, below.

general shift towards an increasingly publisher-centric inquiry which examines the nature and effect of the publisher's act, as opposed to traditional approaches which focus on whether a third party had read the defamatory material. This paper argues that such a shift deviates from the fundamental principles underlying the Traditional Publication Rule and presents conceptual challenges. This paper will finally conclude by examining how the development of a statutory innocent dissemination defence may be a possible solution moving forward. Although the preceding analysis is grounded in Singapore law, the paper is comparative in nature and seeks to draw lessons from Australian and Canadian jurisprudence. The focus of this paper is on the publication limb of defamation specifically, though references to defamation law in general will be made where appropriate.

While defamation by hyperlinks is a very specific form of Internet defamation, it is nevertheless important as the development of the law in this area reveals how different jurisdictions have sought to strike the balance between freedom of speech and protection of a person's reputation in the age of social media. Defamation *via* hyperlinks also deals with the issue of liability for defendants who might not have created the defamatory material, but have played a role in facilitating access to it. This paper considers these issues, and proposes a way forward for Singapore law.

The structure of the paper is as follows: first, a brief background on the law of defamation will be set out to illustrate how the legal requirements to establish publication have developed over time; second, an examination of the landmark judgments which have considered *Crookes*; third, an inter-jurisdictional analysis to highlight key themes; fourth, suggestions for Singapore law moving forward; and lastly, a brief conclusion.

II. Background

A. *Defamation as a Strict Liability Tort*

A *prima facie* case of defamation is established when the plaintiff: (a) proves the defendant published the words; (b) proves that the words are defamatory; and (c) identifies himself as the person defamed.[6] The tort is one of strict liability,[7] and an intention to defame is not required.[8] The principal aim of the tort is to deter and remedy unwarranted harm to reputation.[9] The law looks at the consequences of publication instead of the motive or intention of the publisher.[10] Thus, even if the

---

6 *Lee Hsien Loong v Review Publishing Co Ltd* [2009] 1 SLR(R) 177 at [23] (HC).

7 Richard Parkes QC *et al*, eds, *Gatley on Libel and Slander*, 13th ed (London: Sweet & Maxwell, 2022) at [01-008] [*Gatley*]. See also Gary Chan Kok Yew, "Search Engines and Internet Defamation: Of Publication and Legal Responsibility" (2019) 35 Computer Law and Security Review 330 at 339 [Chan, "Search Engines and Internet Defamation"]; *Jasmin Nisban v Chan Boon Siang* [2023] SGDC 158 at [202] [*Jasmin Nisban*].

8 *Cassidy v Daily Mirror Newspapers, Ltd* [1929] 2 KB 331.

9 *Gatley*, *supra* note 7 at [01-004].

10 *Ibid* at [01-008].

writer of the defamatory material did not intend to defame, liability might nevertheless accrue.[11]

B. *Traditional Publication Rule*

Publication is a factual inquiry,[12] and the focus is on whether the defamatory words have been communicated to a third party.[13] Under traditional defamation law, the plaintiff must show that: (a) the statement was communicated to at least one person aside from the plaintiff; and that (b) the third party would reasonably understand the statement to be defamatory of the plaintiff (the "Traditional Publication Rule").[14] The precise method employed to make the information available is immaterial.[15] Thus in *Day v Bream*, a person who merely delivered parcels was considered *prima facie* liable for putting them into publication.[16] However, the fact that material has been communicated to a third party does not mean that it has been "published". There is a line of cases which suggests that the act which results in the publication of the defamatory material cannot be involuntary.[17] This is most clearly seen from Lord Esher MR's judgment in *Pullman v Walter Hill & Co Ltd* where he said:

> And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication.[18]

Further, in *Huth v Huth*, the defendant sent through post, in an unclosed envelope, a written communication defamatory of the plaintiff which was taken out and read by the plaintiff's butler out of curiosity.[19] The Court of Appeal held that there was no evidence of publication as there was no evidence that, to the defendant's knowledge, the letter would in the ordinary course be likely to be opened by the butler, or by any other person at the plaintiff's house, before it was delivered to her.[20] These cases illustrate the principle that while an intention to publish is generally not required,[21] the defendant may nevertheless avoid liability in cases where some intervening act

---

11 Doris Chia, *Defamation: Principles and Procedure in Singapore and Malaysia* (Singapore: LexisNexis, 2016) at [5.27]; *Jasmin Nisban*, *supra* note 7 at [202].

12 *Bunt v Tilley* [2007] 1 WLR 1243 at [15] (HC, Eng) [*Bunt v Tilley*].

13 Colin Duncan & Brian Neil, *Defamation*, 4th ed (London: Butterworths, 1978) at 36.

14 Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore*, 2d ed (Singapore: Academy Publishing, 2016) at [12.069] [*The Law of Torts in Singapore*].

15 *Crookes*, *supra* note 3 at [83]. See also Vera Bermingham & Carol Brennan, *Tort Law*, 5th ed (Oxford: Oxford University Press, 2016) at 324.

16 *Day v Bream* (1837) 2 Mood & R 54 (HC, Eng); *Crookes*, *supra* note 3 at [83].

17 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 [*Pullman*]. See also *Google LLC v Defteros* [2022] HCA 27 at [130] [*Defteros*].

18 *Pullman*, *supra* note 17 at 527 (cited in *Defteros*, *supra* note 17 at [203]).

19 *Huth v Huth* [1915] 3 KB 32 [*Huth*].

20 *Ibid* at 42-43.

21 For an in-depth discussion on this topic, see David Rolph, "The Concept of Publication in Defamation Law" (2022) 27(1) TLJ 1.

absolves the defendant of responsibility.[22] As the authors of *Gatley on Libel and Slander* explain:

> [I]t is submitted that the true rule is that the defendant will be liable if he has reason to know that the letter may be opened in the ordinary course of business by someone other than the addressee and, probably in modern business conditions, such knowledge will generally be imputed to him, *unless the letter carriers some clear indication* (*eg*, by being marked "personal" or "private and confidential") to show that this should not take place.[23] [emphasis added]

At this juncture, it should also be pointed out that the definition of an involuntary act in publication law has always been very narrowly circumscribed.[24] The aforementioned scenarios described in case law are premised on a third party's actions that led to publication.[25] The holding in *Huth v Huth* and in related cases of involuntary publication should thus be understood as limited exceptions and a derogation from general principle.[26] These cases tend to involve communication of the defamatory matter by the defendant either to the plaintiff directly or to another person on a privileged occasion, in circumstances where it is also accidentally or unintentionally communicated to a third party.[27] The definition of an involuntary act has, however, been stretched in recent years, a point that will be returned to later.

C. *Traditional Publication Rule in the Internet Age*

The publication limb has also been subject to much scrutiny,[28] seeing as the Internet presents new forums for defamatory content to be published. In *Dow Jones & Co Inc v Gutnick*, the court at [26] reiterated the importance of publication being a "bilateral act", holding that:

> Harm to reputation is done when a defamatory article is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it ... It is a

---

[22] *Huth*, *supra* note 19 at 46 where Bray J identified the central questions to be determined: "It was a publication, but the question is whether it was a publication by the defendant, or one for which he was responsible." See also David Rolph, *supra* note 21 at 3-11 where the author explains the need to "identify with particularity the act of publication for which the defendant is responsible, whether that is the defendant's own act or the act of another."

[23] *Gatley*, *supra* note 7 at [07-017].

[24] Rolph, *supra* note 21 at 8. The present paper adopts the term "involuntary" publication to describe the line of judgments where an intervening act absolves the defendant from liability. Many academics and judgments prefer to refer to the line of judgments as "accidental" or "unintentional" publication. However, it is respectfully submitted that these terms are not entirely accurate as an intention to publish is not strictly required.

[25] See also *Gatley*, *supra* note 7 at [07-018].

[26] Rolph, *supra* note 21 at 7.

[27] *Ibid*.

[28] See *eg*, *Crookes*, *supra* note 3 at [84].

> bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension.[29]

This rule has been adopted in Singapore, where various High Court judgments have held that publication on the Internet is established when it can be shown that: (a) the defamatory statements were made available online, and (b) the defamatory material was received by a third party in such a way that it is understood and intelligible (the "Traditional Internet Publication Rule").[30] This is not a departure from the Traditional Publication Rule, but rather, explains how the Traditional Publication Rule can be satisfied in the context of Internet defamation.[31] However, the application of the Traditional Publication Rule to the Internet has generated some controversy. In particular, policy concerns over the balance between freedom of speech and protection of a person's reputation has been the subject of increasing debate.[32] On one hand, it has been argued applying the Traditional Publication Rule in the modern era would result in mass liability, especially considering the ease of accessing online content.[33] This has been argued to potentially create a chilling effect on the freedom of speech.[34] On the other hand, it has been argued that amendments which make the Traditional Publication Rule more stringent might result in individuals who have allegedly been defamed being left with no remedy.[35] An example of one such amendment would be completely excluding hyperlinks from the traditional concept of publication.[36]

D. *Characterisation of Hyperlinks*

Prior to analysing the law around hyperlinks, it is useful to first characterise a hyperlink accurately. For ease of reference, the archetypical scenario is where there is a post which contains a hyperlink to a website that contains defamatory material. The post or article will be referred to as the original post while the defamatory content on the hyperlinked website will be referred to as the defamatory material.

---

29 *Dow Jones & Co Inc v Gutnick* [2002] HCA 56 at [26] [*Dow Jones*].

30 *Qingdao Bohai Construction Group Co, Ltd v Goh Teck Beng* [2016] 4 SLR 977 at [35] (HC) [*Qingdao*]; *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* [2015] 2 SLR 751 at [54] (HC) [*Golden Season*]. See also Matthew Collins, *The Law of Defamation and the Internet*, 3d ed (Oxford: Oxford University Press, 2010) at [5.04].

31 See *Lee Hsien Loong v Leong Sze Hian* [2021] 4 SLR 1128 at [43] (HC) [*Leong Sze Hian*] which lists these two requirements to establish "when publication online suffices as publication for the purposes of defamation."

32 Iris Fischer & Adam Lazier, "*Crookes v. Newton*: The Supreme Court of Canada Brings Libel Law into the Internet Age" (2012) 50(1) Alta L Rev 205. See also Chan, "Search Engines and Internet Defamation", *supra* note 7 at 341.

33 *Crookes*, *supra* note 3 at [25].

34 *Ibid* at [36].

35 *Ibid* at [105].

36 *Ibid*.

1. *Types of hyperlinks*

First, hyperlinks come in various forms. Kim Gould sets out a helpful summary as follows:

> Hyperlinks may be broadly divided into 'ordinary' links and 'framing' links. 'Ordinary' links are the 'most common', and these take the user away from the current web page to a new web page; whereas, 'framing' imports the material from another web page and displays it in a frame on the current web page. Another distinction is drawn between 'user-activated' hyperlinks, which require the user to click on the hyperlink, and 'automatic' hyperlinks, which don't require any action on the part of the user. User-activated hyperlinks are usually displayed as underlined text or a graphic or an icon. A third distinction is between 'shallow' links and 'deep' links. A 'deep' link will take the user straight to the targeted material; whereas, a 'shallow' link will take the user to the home page of another website and from there they will have to click on another one or possibly more links in order to access the targeted page on that website…[37]

Unlike traditional forms of references, hyperlinks can be deployed in many unique ways. These would inevitably have different impact on readers. For example, it should be easier to make an inference that a reader had accessed a deep link to defamatory material rather than a shallow link because of the targeted nature of a deep link.

2. *Hyperlinks compared to other traditional forms of republication*

Next, a hyperlink is different from other traditional forms of republication because it is essentially *a few steps removed*. A reader, by reading the original post that includes a hyperlink to defamatory content, does not directly access the defamatory material. The reader still needs to click on the link to bring him/her to the defamatory material.[38] What separates republication *via* hyperlinks and traditional republication is therefore the reader's act of clicking on the link and navigating to the defamatory material which would *complete* the act of publication, assuming that the Traditional Publication Rule applies. Therefore, to establish liability for a hyperlinker, it should be necessary to show that the third party had read the defamatory material *through* the hyperlink provided. Simply showing that the defamatory material was read by a third party is insufficient, as readers could have accessed the defamatory material *via* other hyperlinks or avenues. Publication is a bilateral act,[39] and it is both the acts of the publisher in making the material available, and the reader in receiving the material, which completes the act of publication. For example, in *Lee Hsien Loong v Leong Sze Hian* ("*Leong Sze Hian*"), the court found that

---

[37] Kim Gould, "Hyperlinking and defamatory publication: A question of 'trying to fit a square archaic peg into the hexagonal hole of modernity'?" (2012) 36(2) Austl Bar Rev 137 at 148.

[38] The nature of the link will determine how many steps is required to access the defamatory material. For "deep" links, this would usually take one click. For "shallow" links, a few more clicks are required.

[39] *Dow Jones*, *supra* note 29 at [26].

publication was made out as, *inter alia*, individuals within Singapore had "through [the] link, accessed [the defamatory material]".[40] The court in *Leong Sze Hian* noted that insisting on direct evidence of such access is unrealistic, and relied on circumstantial evidence to find that it was exceedingly unlikely that "not a *single* person accessed the Article through the link in the Post".[41] In practice, it is acknowledged that it might not always be possible to obtain information about how many times a hyperlink has been clicked on. Nevertheless, in such situations, the court can rely on circumstantial evidence such as the number of views and engagement the post received, the number of followers the individual making the post had, and whether the post was made public, to draw an inference that a third party had read the defamatory material in the absence of direct evidence.[42]

III. Approaches Across the Jurisdictions

In *Crookes*, the Canadian Supreme Court considered whether/when the provision of a hyperlink would constitute publication. The judgment in *Crookes* was significant because of the difference in approaches proposed by the different judgments and its potential impact on the free flow of information across the Internet.[43] The judgment in *Crookes* was also considered in numerous jurisdictions, and provided a basis for much discussion on the traditional principles underlying publication. In this section, we will first examine *Crookes* and the various approaches proffered. Next, the approach in Australia will be discussed, and lastly, the approach in Singapore. These jurisdictions have been chosen because they have had the opportunity to directly address the judgment in *Crookes* and deal with the issue of hyperlinks. Further, these jurisdictions have formulated their own unique approaches to address this issue.

A. *Canada*

In *Crookes*, the defendant, Jon Newton, owned and operated a website in British Columbia containing commentary about various issues, including free speech and the Internet.[44] One of the articles posted on his website contained hyperlinks to other websites, which in turn contained information about Wayne Crookes.[45] The two hyperlinks (as underlined) are reproduced as follows:

> Under new developments, ... I've just met Michael Pilling, who runs OpenPolitics.ca. Based in Toronto, he, too, is being sued for defamation. This time by politician Wayne Crookes.

---

40 *Leong Sze Hian*, *supra* note 31 at [37].

41 *Ibid* at [46]. It should be noted that in this case, given the defendant's submission of no case to answer, it was only required that the desired inference was one of the possible inferences as opposed to an irresistible inference.

42 Some of these factors were considered in *Leong Sze Hian*, *supra* note 31 at [46].

43 Gould, *supra* note 37 at 138.

44 *Crookes*, *supra* note 3 at [5].

45 *Ibid*.

> We've decided to pool some of our resources to focus more attention on the appalling state of Canada's ancient and decrepit defamation laws and tomorrow, p2pnet will run a post from Mike [Pilling] on his troubles. He and I will also be releasing a joint press statement in the very near future.[46]

OpenPolitics.ca was a "shallow" hyperlink that brought users to the Open Politics website where several articles were posted and were said by Crookes to be defamatory.[47] Wayne Crookes was a "deep" hyperlink that brought users to an allegedly defamatory article called "Wayne Crookes", published anonymously on the website www.USGovernetics.com.[48] Crookes and his lawyer wrote to Newton asking him to remove the two hyperlinks but Newton refused to do so.[49] Crookes did not allege that any of the text on Newton's website was itself defamatory.[50] Rather, Crookes argued that two of the hyperlinks on an article posted on Newton's website were connected to defamatory material and by using those hyperlinks, Newton was publishing the defamatory material.[51] When the case was brought, the article on Newton's website had been viewed 1,788 times though there was no information about how many times the hyperlinks themselves had been clicked on or followed.[52] The appeal was brought by Crookes after the trial judge and Court of Appeal ruled in Newton's favour. All the judges agreed on the outcome and dismissed the appeal by Crookes. However, three different approaches were formulated by the different judges in the Supreme Court which merit further analysis.

1. *Judgment of the majority: The "bright-line" rule*[53]

The majority's judgment was handed down by Abella J, with Binnie, LeBel, Charron, Rothstein and Cromwell JJ concurring. They adopted a "bright-line" rule that a hyperlink by itself can never be treated as amounting to publication of the linked content.[54] This applies even if the reader follows the hyperlink and accesses the defamatory content.[55] Abella J argued that if one were to apply the Traditional Publication Rule in a "formalistic" manner to hyperlinks, this would have the effect of creating a presumption of liability for all hyperlinkers, which was an "untenable situation".[56] Instead, Abella J preferred to characterise the act of hyperlinking as a "reference to other content" and explained that it was fundamentally different from other acts involved in publication as referencing something does not involve

---

46 *Ibid* at [7].

47 *Ibid* at [6]-[8].

48 *Ibid* at [6]-[8]. As earlier explained, a "deep" link will take the user straight to the targeted material whereas a "shallow" link will take the user to the home page of another website and from there they will have to click on another one or possibly more links in order to access the targeted page on that website.

49 *Ibid* at [9].

50 *Ibid* at [10]; Fischer & Lazier, *supra* note 32 at 206.

51 *Crookes*, *supra* note 3 at [10].

52 *Ibid*.

53 The names of the various approaches in *Crookes* have been adopted from Gould, *supra* note 37.

54 *Crookes*, *supra* note 3 at [44].

55 *Ibid*.

56 *Ibid* at [25].

exerting control over the content.[57] The person who inserts a hyperlink neither participates in the creation or development of the defamatory content.[58] Further, she highlighted that the content of the hyperlinked material can be changed at any time by the secondary author beyond the control of the primary author who inserted the hyperlink in the first place.[59] While hyperlinks facilitate easier access to the defamatory material, this does not change the reality that a hyperlink, by itself, is content-neutral.[60] Next, she explained that such an interpretation also accorded better with the Canadian jurisprudence on defamation law and the Canadian Charter of Rights and Freedoms which recognised the importance of achieving a proper balance between protecting an individual's reputation and the public's interest in protecting freedom of expression.[61] Emphasising the importance of hyperlinks in facilitating access to information,[62] Abella J explained that subjecting hyperlinks to the Traditional Publication Rule would have the effect of seriously restricting the freedom of expression.[63] This might create a chilling effect as primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control.[64] As such, she concluded that making reference to the existence of content using a hyperlink, without more, would not constitute publication of that content.[65] This applied to both the deep and shallow links within Newton's article.[66]

2. *Judgment of McLachlin CJ and Fish J: The adoption/endorsement standard*

McLachlin CJ and Fish J largely agreed with majority's reasoning, but differed on whether a hyperlink can constitute publication. Instead, they preferred the following test:

> [A] hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to…[67]

This approach effectively carves out an *exception* to the general "bright-line" rule set out by the majority. Under this approach, where the text communicates agreement

---

57 *Ibid* at [26].
58 *Ibid* at [28].
59 *Ibid* at [27].
60 *Ibid* at [30].
61 *Ibid* at [31].
62 *Ibid* at [35]. See generally Dalal, *supra* note 2; Chan, "Search Engines and Internet Defamation", *supra* note 7 at 340-343.
63 *Crookes*, *supra* note 3 at [36].
64 *Ibid*.
65 *Ibid* at [42].
66 *Ibid* at [44].
67 *Ibid* at [50]. See also Gary Chan Kok Yew, "Defamation via Hyperlinks – More Than Meets The Eye" (2012) 128(3) LQR 346 at 348-349 [Chan, "Defamation via Hyperlinks"] where Professor Gary Chan suggests that an example of "adoption or endorsement" could be found in the trial judge's hypothetical example, namely the statement that "the truth about Wayne Crookes is found here" and here referred to the hyperlink connected to the defamatory material.

with the linked content, the hyperlinker should be liable for the defamatory content.[68] This was "consistent with the general law of defamation",[69] in particular, the judgment in *Hill v Church of Scientology of Toronto* which held that both the person who originally utters a defamatory statement, and the individual who expresses agreement with it, are liable for the injury.[70] The Judges similarly acknowledged such a position was also a departure from the Traditional Publication Rule which does not require the publisher to approve of the material published.[71] However, they argued that this approach was nevertheless justifiable because the defamatory context is only incorporated into the text when the text endorses or approve of the hyperlinked material.[72] Thus, the content of the text comes to include the defamatory content accessed *via* the hyperlink.[73] The hyperlink, combined with the surrounding words and context, ceases to be a mere reference, and the content to which it refers to becomes part of the published text itself.[74] Therefore under McLachlin CJ's approach, where the original post adopts or endorses the defamatory material, the defamatory material becomes part of the original post and they are read as a singular post.

3. *Judgment of Deschamps J: The revised Traditional Publication Rule*

The last approach espoused by Deschamps J proposed the least change to the Traditional Publication Rule. Her approach focused on the plaintiff's burden to prove that: (a) the defendant performed a "deliberate" act that made the defamatory information readily available to a third party in a comprehensible form; and (b) the third party had received the defamatory material and understood it.[75] Deschamps J explained that the majority approach failed to appreciate the difference in how references, including hyperlinks, vary in respect of their ability to make defamatory content readily accessible to others, which has varying consequences on the harm it can cause to reputation.[76] Instead of a bright-line rule, the inquiry should focus on how easy it was for a third party to receive the information.[77] Unlike the majority which viewed hyperlinks as mere references, Deschamps J advocated a more nuanced approach which emphasised the extent to which a specific hyperlink facilitated access. This involved considering factors including: whether the hyperlink was user-activated or automatic, whether it was a shallow or deep link, and whether the page contained more than one hyperlink.[78] Next, the "deliberate act"

---

68 *Crookes*, *supra* note 3 at [48].
69 *Ibid* at [49].
70 *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 at [176] (SC, Can) (cited in *Crookes*, *supra* note 3 at [49]).
71 *Crookes*, *supra* note 3 at [51].
72 *Ibid*.
73 *Ibid*.
74 *Ibid*.
75 *Ibid* at [93]. See Chan, "Defamation via Hyperlinks", *supra* note 67 at 349.
76 *Ibid* at [58].
77 *Ibid* at [96].
78 *Ibid* at [110].

requirement requires that the defendant played more than a "passive instrumental role" in making the information available.[79] This point was less controversial as all the judges agreed that only deliberate acts could constitute publication,[80] citing the judgment in *Bunt v Tilley*[81] which found that Internet Service Providers were not publishers. The last point made by Deschamps J was that by excluding hyperlinks from being a form of publication, there was a risk of favouring freedom of expression over reputational interest.[82] If no remedy existed against hyperlinkers, persons defamed online may in many cases not be able to protect their reputations.[83] Applying this approach, Deschamps J found that the shallow link did not fulfil the first component of publication as further action by the reader was required to find the defamatory material, thus the material was not readily available.[84] Posting the deep link, in contrast, was a deliberate act in making the defamatory material readily available.[85] However, as there was not enough evidence to prove, on a balance of probabilities, that a third party had received and understood the information to which the reference was made, Deschamps J held that there was no publication.[86]

4. *Analysis on the judgment in Crookes*

The fundamental difference between the approaches lies in the degree of adherence to the Traditional Publication Rule. The "bright line" rule stands alone in rejecting any possibility for hyperlinks to constitute publication and represents the furthest deviation from the Traditional Publication Rule. McLachlin CJ's "adoption or endorsement" approach acknowledges that this is possible, but imports an additional requirement that the post accompanying the hyperlink must show adoption or endorsement of the defamatory content.[87] Notably, both the "bright line" rule and the "adoption or endorsement" approach represent significant shifts in the nature of the publication inquiry. Under both approaches, the focus is on the actions of the individual posting the hyperlink as opposed to whether the defamatory content has been communicated to a third party, thus representing a deviation from the first principles underlying the publication inquiry. The "bright-line" rule in particular is problematic as it appears to make it extremely easy to escape liability. For example, instead of republishing a defamatory article, the individual can simply post a hyperlink to that same article and avoid liability under the majority's "bright-line" approach. By focusing on the actions of the alleged publisher instead of whether the information has been communicated to the reader, the "bright-line" rule draws an artificial distinction in the aforementioned case, overlooking the fact that if the reader simply clicks on the hyperlink, the defamatory material would be

---

79 *Ibid* at [91].
80 *Ibid* at [21], [88].
81 *Bunt v Tilley*, *supra* note 12.
82 *Crookes*, *supra* note 3 at [105].
83 *Ibid*.
84 *Ibid* at [124].
85 *Ibid* at [125].
86 *Ibid* at [127].
87 *Ibid* at [50].

communicated to the reader and damage to reputation would be caused in both cases. On the other hand, Deschamps J's "revised traditional publication" rule still focuses on the bilateral nature of publication as the second limb of her approach still requires the defendant to show that a third party had seen the defamatory content.[88] The first limb of Deschamps J's approach, that the defendant must have committed a "deliberate" act, is a reflection of the emerging consensus within the law of publication that passive acts cannot constitute publication,[89] which is further explored later.

B. *Australia*

The Australian position on defamation *via* hyperlinks was authoritatively set out by the High Court of Australia in *Google LLC v Defteros* ("*Defteros*").[90] While the court's eventual judgment centred around whether search engine results generated by algorithms were too "passive" to constitute publication,[91] this paper will focus on the holdings in the judgment relating to hyperlinks. In *Defteros*, the respondent was a solicitor who practiced criminal law for many years.[92] He had acted for persons who had become well-known during Melbourne's "gangland wars", including one Mario Condello.[93] In 2004, the respondent and Mr Condello were charged with conspiracy to murder and incitement to murder.[94] While the charges were eventually withdrawn, the prosecution of the respondent and Mr Condello was widely reported, including in *The Age* newspaper, and articles were placed on that newspaper's website.[95] In early 2015, the respondent became aware that Internet searches of his name using the Google search engine produced search results which included a snippet of an article published by *The Age* in 2004.[96] The search results included the title of the article, "Underworld loses valued friend at court" and contained a hyperlink to the full article.[97] The respondent claimed damages for defamation from the appellant and argued that the appellant was a publisher of the defamatory article.[98] The majority consisting of Kiefel CJ, Gleeson J, Edelman J, Steward J,

---

88 *Ibid* at [62].

89 *Ibid* at [88].

90 *Defteros*, *supra* note 17. It should be noted that amendments to the Model Defamation Provisions in Australia have since been approved on 23 September 2023. Under Part A of the Stage 2 reviews, amendments include two conditional, statutory exemptions from defamation liability for a narrow group of internet intermediaries, including search engines in relation to organic search results. See New South Wales Government, *Review of Model Defamation Provisions*, online: *NSW Government* <https://dcj.nsw.gov.au/about-us/engage-with-us/public-consultations/statutory-reviews/review-model-defamation-provisions.html>.

91 This issue is tangentially related to the present discussion and will be discussed briefly but is not the focus of this paper. For an excellent discussion on this topic, see Chan, "Search Engines and Internet Defamation", *supra* note 7; Jerrold Soh, "Legal dispositionism and artificially-intelligent attributions" (2023) 43(4) LS 583 at 593. See generally Susan Corbett, "Search Engine and the Automated Process: Is a Search Engine "a Publisher" of Defamatory Material?" (2014) 20(3) NZBLQ 200.

92 *Defteros*, *supra* note 17 at [1].

93 *Ibid*.

94 *Ibid*.

95 *Ibid*.

96 *Ibid* at [2].

97 *Ibid*.

98 *Ibid* at [3].

Gageler J allowed the appeal, holding that Google LLC was not a publisher of the defamatory article. Two separate dissenting judgments were issued by Keane J and Gordan J. The following section considers the reasoning in the various judgments.[99]

1. *Judgments of the majority*

In the first majority judgment, Kiefel CJ and Gleeson J affirmed that publication should be understood as a bilateral act by which the publisher makes the defamatory material available and a third party has it available for their comprehension.[100] However, publication requires an act of "participation" in the communication of defamatory matter to a third party.[101] This "participation" is independent of the knowledge or intent of the publisher.[102] Drawing a contrast to the Australian High Court's previous judgments,[103] the court held at [49] that:

> [Google LLC] did not approve the writing of defamatory matter for the purpose of publication. It did not contribute to any extent to the publication of the Underworld article on *The Age*'s webpage. It did not provide a forum or place where it could be communicated, nor did it encourage the writing of comment in response to the article which was likely to contain defamatory matter. Contrary to the finding of the trial judge, the appellant was not instrumental in communicating the Underworld article. It assisted persons searching the Web to find certain information and to access it.[104]

In the course of her judgment, Kiefel CJ acknowledged that there were aspects of the majority approach in *Crookes* that could not be followed because it was based on values drawn from the Canadian Charter of Rights and Freedoms.[105] Nevertheless, Kiefel CJ expressed agreement with the proposition laid out by Abella J that a hyperlink is content-neutral.[106] In the same vein, a search result was fundamentally a reference to something else, and facilitating a person's access to the contents of another's webpage was not participating in the bilateral process of communicating its contents to that person.[107] She argued that to hold that the provision of a hyperlink made the appellant a participant in the communication of the Underworld article would "expand the principles relating to publication".[108] As the appellant neither approved nor encouraged the writing of the defamatory material, it could not be considered a publisher.[109] Gageler J largely agreed with the reasons given by

---

[99] Edelman J and Steward J's judgment is omitted as their judgment centered largely around the reasons why the appellant's various submissions were untenable. Nevertheless, reference will be made to their judgment where appropriate.

[100] *Defteros*, *supra* note 17 at [40].

[101] *Ibid* at [24].

[102] *Ibid* at [21].

[103] *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 [*Voller*]; *Webb v Bloch* [1928] HCA 50.

[104] *Defteros*, *supra* note 17 at [49].

[105] *Ibid* at [41].

[106] *Ibid* at [53].

[107] *Ibid*.

[108] *Ibid*.

[109] *Ibid* at [49].

Kiefel CJ and Gleeson J but added a caveat in his judgment. While he accepted that the provision of a hyperlink is not enough to amount to publication, he argued that the provision of a hyperlink might combine with other factors to amount to participation in the process of publication of matter on that other webpage.[110] Citing the judgment in *Hird v Wood*,[111] he noted that:

> [T]he taking of action which draws the attention of a third party to the availability of matter in a manner which has the effect of enticing or encouraging the third party to take some step which results in that matter becoming available for his or her comprehension can be sufficient to amount to participation in publication of that matter…[112]

In this case, Google did not, merely by providing the search result in a form which includes the hyperlink, direct, entice or encourage the searcher to click on the hyperlink.[113] Accordingly, he dismissed the appeal.

2. *Judgments of the minority*

In separate judgments, Keane J and Gordan J disagreed with the ruling of the majority. Primarily, they disagreed with the characterisation of the Google search algorithm as a passive tool and argued that this was downplaying the significance of its role in bringing the defamatory article to the reader.[114] Additionally, Gordan J held that acts which precede the comprehension by third parties of defamatory material can amount to publication, and that such acts may include providing a platform for the communication of defamatory matter.[115] Notably, Gordan J also added that he did not think the Traditional Publication Rule required modification to deal with technological advances. As he put it:

> The law of defamation has consistently had to grapple with technological advances, which are "much older than the Internet and the World Wide Web". The common law was not seen to require modification in order to deal with the advent of the telegraph or the telephone, radio or television, the internet or social media. And it has not been shown to require modification in order to deal with the Google search engine system and the hyperlink in this case.[116]

3. *Analysis on the Australian Approach*

A closer examination of the Australian approach will reveal that the judges were largely in agreement about the applicable law. Instead, their disagreement centred

---

[110] *Ibid* at [66].
[111] *Hird v Wood* (1894) 38 SJ 234 (CA, Eng).
[112] *Defteros*, *supra* note 17 at [66].
[113] *Ibid* at [74].
[114] *Ibid* at [98]-[100], [144].
[115] *Ibid* at [141].
[116] *Ibid* at [155].

around differing applications to the case. As laid out by Gordan J at [130] of *Defteros*, citing the majority in *Fairfax Media Publications Pty Ltd v Voller* ("*Voller*"),[117] publication is established when:

> [F]irst, any person who, by an intentional – in the sense of active and voluntary – act, participates, assists or is instrumental in, or contributes to any extent to the process directed to making defamatory matter available for comprehension by a third party is a publisher...and, in all cases, a person is a publisher regardless of whether they knew that the matter contained defamatory content. Finally, publication is a bilateral act which occurs when the matter is available to be comprehended, and is accessed in a comprehensible form, by a third party.[118]

Publication under Australian law can be understood under two broad requirements: (a) an intentional act that results in participation or contribution to any extent to the process in making the defamatory available to a third party; and (b) the matter is available to be comprehended, and is accessed in a comprehensible form, by a third party (the "Australian Approach"). For present purposes, it suffices to note that that all of the judges were ultimately in agreement that "intention" and "participation", albeit defined differently,[119] were required to be established. It is also apposite to briefly comment on some of the terminology used in Kiefel CJ's judgment in *Defteros*. In coming to the conclusion that there was no participation, Kiefel CJ pointed out that the creation of the defamatory article was "in no way approved or encouraged" by the appellant.[120] She also mentioned that: "the rules of publication apply where a person endorses, adopts or otherwise approves of defamatory material which is to be published."[121] At first glance, this might seem extremely similar to the "adoption or endorsement" approach espoused by McLachlin CJ in *Crookes*.[122] However, the two ideas are *conceptually distinct*. The reference to approval and encouragement in *Defteros* was meant to highlight one of many ways to prove that the defendant's role was not merely passive. It is likely that other actions mentioned in *Defteros*, *ie*, providing a forum,[123] which might not rise to the level of displaying adoption or encouragement, would suffice to establish participation as well. In contrast, McLachlin CJ's approach in *Crookes* necessarily entails that "adoption or endorsement" must be shown as a *substantive requirement*. As explained in *Crookes*, McLachlin CJ took the view that only where the original post adopted or endorsed the defamatory text, could the defamatory text be incorporated

---

[117] *Voller*, *supra* note 103.

[118] *Defteros*, *supra* note 17 at [130]. The majority judgment in *Voller* is similarly cited by Kiefel CJ and Gleeson J at [21] and Keane J at [87]-[88] as the elements required to establish publication. Only Edelman J and Steward J preferred a different formulation, citing their opinion on the ways in which a defendant might be found to be a publisher at [200].

[119] In *Voller*, *supra* note 103, the majority consisting of Kiefel CJ, Keane J, Gleeson J, Gageler J and Gordan J defined intention as "active" and "voluntary" at [32], [66]. Edelman J required a higher threshold of intention to communicate at [112]-[113], while Steward J disagreed on what constitutes participation at [178]-[180].

[120] *Defteros*, *supra* note 17 at [34].

[121] *Ibid* at [45].

[122] See *Crookes*, *supra* note 3 at [50].

[123] *Defteros*, *supra* note 17 at [49].

into the original post.[124] This proposition was rejected by Kiefel CJ as she found that the concept of incorporation had "no place in the law of defamation".[125] Thus, while the terms used by Kiefel CJ and McLachlin CJ bear similarity, it is submitted that the substantive approaches are different. At this juncture, two further comments can be made about the Australian Approach. First, the Australian Approach differs from the majority judgment in *Crookes* insofar as it retains the bilateral test for publication. However, it adds further requirements to the Traditional Publication Rule that the publisher must satisfy before being held liable such as the need to show that the publisher had participated, assisted, or contributed.[126] Secondly, and relatedly, the terms "approval", "endorsement" and "adoption" are extremely nebulous and cause confusion. For example, the threshold for what constitutes "approval" is extremely vague. Would *positive* approval, *ie*, an agreement to include content in a post/paper but not necessarily agreement with its contents, suffice? Or would *normative* approval, *ie*, actual agreement with the contents of the materials, suffice?[127] To illustrate the difference, one can consider the difference in positions between the editor of a journal and the author of an article. By publishing the article in an edition of the journal, the editor has evinced *positive* approval, but not necessarily *normative* approval, as the editor might actually hold different views from the author of the article. In practice, this is quite commonly the case and authors often add disclaimers that the views expressed in their articles are their own and do not reflect the opinions of the particular journal. What is unclear is whether the editor's mere act of including the article in the journal is sufficient to show "approval" under the Australian Approach. The same issues apply to the different tests of "endorsement" or "adoption". This is most evident from the judgment in *Defteros*, where the judges disagreed on whether Google's search engine algorithm met this threshold.[128]

C. *Singapore*

In Singapore, the issue of defamation *via* hyperlinks arose in *Leong Sze Hian*. While the issue of Internet defamation had been canvased in prior judgments,[129] this was the first opportunity for the court to apply these principles to the issue of hyperlinks. The defendant was a columnist who described himself as a well-known campaigner for human rights and a government critic.[130] The plaintiff was the Prime Minister

---

[124] *Crookes*, *supra* note 3 at [50]-[51].

[125] *Defteros*, *supra* note 17 at [45].

[126] *Ibid* at [130].

[127] See Chan, "Defamation via Hyperlinks", *supra* note 67 at 348.

[128] *Defteros*, *supra* note 17 at [49], [100], [144]. The position on this in Australia is made clearer by Part A of the Stage 2 Review of the Model Defamation Provisions, which a majority of the states in Australia have agreed to use best endeavours to enact for commencement from 1 July 2024. The proposed Section 10D of the Model Defamation Amendment (Digital Intermediaries) Provisions 2023 states that a search engine provider for a search engine is not liable for defamation for: (a) the publication of digital matter comprised of search results if the provider's role was limited to providing an automated process for the user of the search engine to generate the results; or (b) the publication of digital matter to which the search results provide a hyperlink if the provider's role in the publication of the matter is limited to the role mentioned in (a). See also William van Caenegem, "Is Google a publisher when its search results hyperlink to defamatory material?" (2022) 25(4/5) Internet Law Bulletin 66.

[129] See *eg*, *Golden Season*, *supra* note 30; *Qingdao*, *supra* note 30.

[130] *Leong Sze Hian*, *supra* note 31 at [4].

of Singapore.[131] The plaintiff sued the defendant for having shared an article titled "Breaking News: Singapore Lee Hsien Loong Becomes 1MDB's Key Investigation Target – Najib Signed Several Unfair Agreements with Hsien Loong In Exchange For Money Laundering" on a Facebook Post (the "Post").[132] The defendant had done this by sharing a hyperlink to the defamatory article (the "Article") in a post on his Facebook "timeline" for about 3 days, during which time the Post attracted multiple responses from individuals who had seen it.[133] The defendant did not include any accompanying text or commentary in the Post, which simply indicated that the defendant had shared a link, with part of the Article's title and an image from the Article being displayed.[134] The court allowed the claim, and found that, *inter alia*, there was publication in Singapore of the offending words in the Article.[135] In addressing whether the defamatory material was published by virtue of the hyperlink in the Post, Abdullah J chose to adopt the traditional Internet publication rule endorsed in *Qingdao Bohai Construction Group Co, Ltd v Goh Teck Beng* ("*Qingdao Bohai*")[136] and *Golden Season Pte Ltd v Kairos Singapore Holdings Pte Ltd* ("*Golden Season*").[137] Abdullah J found that the defamatory article was published as: (i) the defamatory article was part of the post, by virtue of having been hyperlinked from the post ("first basis of publication");[138] and (ii) the article was made accessible to individuals within Singapore through his link and individuals within Singapore had, in fact, through this link, accessed it ("second basis of publication").[139] Either of these bases was sufficient to establish publication.[140] With respect to the first basis of publication, Abdullah J explained that in so far as the defamatory material forms part of the Post, and the Post itself had been published, the Article can be said to have been published by the defendant as well.[141] Support for this proposition was drawn from the judgment of *Daniel Poulter MP v Times Newspapers Limited* ("*Daniel Poulter*").[142] Where the content of the post would make it an "irresistible inference" that the ordinary reasonable reader would follow the hyperlink, provision of the link would amount to publication.[143] While the post in *Leong Sze Hian* was a bare link without any comment on its own,[144] Abdullah J considered, *inter alia*, that the link to the Article was the only substantive content of the post.[145] The entire content of the post was, in effect, the Article and it would be "artificial to draw a bright-line distinction between the two".[146] Further, there was no other plausible interpretation of the link to the Article apart from the defendant

---

131 *Ibid* at [4].
132 *Ibid* at [1].
133 *Ibid* at [7]-[8].
134 See *Leong Sze Hian*, *ibid*, at [6] for a photo of the post.
135 *Ibid* at [47].
136 *Qingdao*, *supra* note 30.
137 *Golden Seasons*, *supra* note 30.
138 *Leong Sze Hian*, *supra* note 31 at [37].
139 *Ibid*.
140 *Ibid*.
141 *Ibid* at [38].
142 *Daniel Poulter MP v Times Newspapers Limited* [2018] EWHC 3900 [*Daniel Poulter*].
143 *Ibid* at [21] (cited in *Leong Sze Hian*, *supra* note 31 at [39]).
144 *Leong Sze Hian*, *supra* note 31 at [41].
145 *Ibid* at [42(a)].
146 *Ibid*.

in some way endorsing or supporting the content in the link.[147] Accordingly, it could be inferred[148] that the reader would follow the hyperlink.

With respect to the second basis of publication, Abdullah J highlighted the following considerations which formed a "platform of facts" for this conclusion:

(a) the number of "likes", "shares", "reactions" and comments which a post draws;
(b) the number of "friends" and "followers" the poster has on the relevant social media platform; and
(c) the privacy setting of the relevant post.[149]

Applying these considerations, Abdullah J considered that 45 persons responded to the Post containing the link to the defamatory article, and the defendant had about 5,000 Facebook friends and 149 followers.[150] Further, the Post was set to public.[151] In light of this, it was "exceedingly unlikely" that not a single person accessed the defamatory article through the link in the post.[152] As it was a possible inference that a third party had accessed the defamatory article through the link on the post, there was publication of the defamatory article.[153]

1. *Analysis of Singapore's Approach*

Abdullah J described the first base for finding publication in the following terms: "the Article is part of the Post, by virtue of having been hyperlinked from the Post".[154] This, on the surface, seems to be a reference to the idea of incorporation, similar to the reasoning espoused by McLachlin CJ. However, there are clear differences with the approach to incorporation in *Crookes*. McLachlin CJ held that only where the original post adopted or endorsed the defamatory content would the defamatory content be incorporated into the text of the original post.[155] In contrast, the court in *Leong Sze Hian* seemed to suggest that the defamatory content would form part of original post where one can draw an "irresistible inference" that the reasonable reader would have followed the hyperlink to the defamatory content.[156] This can be achieved regardless of whether the comments of the original posts were disparaging or endorsing, so long as it sufficiently entices the reader to click on the hyperlink.[157] The difference between two approaches thus lies in the fact that McLachlin CJ's test makes it a requirement that the original post endorses or adopts the defamatory

---

147 *Ibid* at [42(b)].
148 *Ibid* at [42(c)]. It should be noted that in this case, due to the defendant's submission of no case to answer, this inference need not be an "irresistible" inference. The plaintiff only needed to show that the desired inference is one of the possible inferences.
149 *Ibid* at [45]-[46].
150 *Ibid* at [46].
151 *Ibid*.
152 *Ibid*.
153 *Ibid*.
154 *Ibid* at [37].
155 *Crookes*, *supra* note 3 at [50].
156 *Leong Sze Hian*, *supra* note 31 at [39].
157 *Ibid* at [40].

content for it to be successfully incorporated. On the other hand, the reasoning in *Leong Sze Hian* suggests that this is not a strict requirement and is only relevant insofar as the endorsement in the original post would incline the reasonable reader to follow the hyperlink. To illustrate, assume a post writes: "I completely disagree! Click this link and see for yourself.", with a link to a defamatory article attached. Under McLachlin CJ's approach, the defamatory article would not be part of the original post as the post does not adopt or endorse the defamatory article. However, under the approach in *Leong Sze Hian*, the defamatory article would likely be part of the original post as it is likely that the reasonable reader would have followed the hyperlink to the defamatory content. Two further points should be made here. First, it is submitted that references to incorporation by Abdullah J were likely unintended. While Abdullah J's holding that "the Article is part of the Post" seems to reference the idea of incorporation,[158] another plausible interpretation is that he simply meant to say that both the Article and Post should be read in full. This is seen from Abdullah J's reference to the judgment of *Charleston v News Group Newspaper Ltd* ("*Charleston*"),[159] which stands for the proposition that the material had to be read "holistically and in full",[160] but makes no express reference to incorporation. At [39] of *Leong Sze Hian*, Abdullah J cited a proposition from *Daniel Poulter*, which laid out limits for when the proposition in *Charleston* would apply. For example, where a long article contained a large number of hyperlinks, it would be unrealistic to expect the ordinary reasonable reader to follow every single one of them, thus the proposition in *Charleston* would not apply. In contrast, where a single statement says, "X is a liar", and a hyperlink is given, "it is almost an irresistible inference to conclude that the ordinary reasonable reader would have to follow the hyperlink in order to make sense of what was being said".[161] It is submitted that Abdullah J was simply trying to apply the proposition in *Charleston* to the present case, as opposed to making a reference to incorporation. In fact, Abdullah J was likely attempting to apply the Traditional Internet Publication Rule, as seen from his references to the earlier judgments of *Qingdao Bohai* and *Golden Season* at [43], which applied the Traditional Internet Publication Rule. Under Abdullah J's analysis, where the court can make an irresistible inference that the reader would follow the hyperlink in the post, and that post has been published, the natural corollary is that the reader would have accessed the defamatory material. This first basis of publication can be understood as an alternative way to prove that a third party had read and accessed the material under the Traditional Internet Publication Rule, without reference to the concept of incorporation. Second, the legal implications of incorporation should also be noted. The incorporation theory treats the defamatory material as part of the original post, and this might mean that the hyperlinker is treated as a primary publisher for the purposes of considering whether he/she can avail themselves of the innocent dissemination defence.[162] Therefore, while it should theoretically be possible to show publication *via* the theory of incorporation, it is submitted that it is not

---

158 *Ibid* at [37].

159 *Charleston v News Group Newspaper Ltd* [1995] 2 AC 65 [*Charleston*].

160 *Leong Sze Hian*, *supra* note 31 at [39].

161 *Ibid* at [39] (citing *Daniel Poulter*, *supra* note 142).

162 See *eg*, Defamation Act 1996 (c 31) (UK) s 1 [UK Defamation Act 1996] which excludes the defence from an "author". See also *Gatley*, *supra* note 7 at [07-050].

strictly necessary, and the corresponding legal implications for hyperlinkers must be considered. The second basis for finding liability is largely similar to the second limb of Deschamps J's approach and the Australian Approach. Abdullah J held that because the defendant had made the defamatory material accessible, and individuals within Singapore had, through his link, accessed it,[163] publication was made out. This is also derived from the Traditional Publication Rule and is premised on the ability of the court to make the inference that third parties had actually accessed the material.[164] In summary, the approach in *Leong Sze Hian* largely accords with the Traditional Publication Rule. It is submitted that Abdullah J was not attempting to write a new rule for hyperlinks, but merely attempting to apply the rules on Internet defamation set out in earlier judgments.

IV. Inter-Jurisdictional Analysis

The following table breaks down the key approaches developed in the different jurisdictions by reference to the bilateral nature of publication:

Approach	Nature of the alleged publisher's acts	Corresponding action by reader
Traditional Publication Rule[165]	Voluntary Act that results in the communication of the defamatory material to a third party	Read and understood the defamatory material
Traditional Internet Publication Rule[166]	Voluntary Act that makes the defamatory statement available online	Received the defamatory material in a way that is understood and intelligible
Bright Line Rule[167]	Hyperlinks can never constitute publication	
Adoption/ Endorsement Rule[168]	Hyperlinks can never constitute publication unless the accompanying text adopts or endorses the defamatory material	
Revised Traditional Publication Rule[169]	Deliberate act that makes defamatory material readily available to a third party in a comprehensible form	Received and understood the defamatory material
Australian Approach[170]	Intentional – in the sense of active and voluntary – act,[171] that participates, assists, or is instrumental in, or contributes to any extent to the process directed to making defamatory material available to third parties	Accessed in comprehensible form

[163] *Leong Sze Hian*, *supra* note 31 at [37].
[164] *Ibid* at [46].
[165] *The Law of Torts in Singapore*, *supra* note 14 at [12.069].
[166] *Leong Sze Hian*, *supra* note 31 at [43].
[167] *Crookes*, *supra* note 3 at [44]. This is the approach proffered by the majority in *Crookes*.
[168] *Ibid* at [50]. This is the approach proffered by McLachlin CJ and Fish J.
[169] *Ibid* at [93]. This is the approach proffered by Deschamps J.
[170] *Defteros*, *supra* note 17 at [130].
[171] It should be noted, however, that the position on what constitutes an "intentional" act is not conclusive. As explained above, the majority and minority in *Voller*, *supra* note 103 dissented on the threshold required for intention to be established.

The approaches may be categorised by the level of modification to the Traditional Publication Rule as follows:

(a) approaches that retain the Traditional Publication Rule ("Traditional Approach"): Singaporean Approach;
(b) approaches that largely retain the Traditional Publication Rule, with increased requirements for publishers ("Revised Approaches"): Revised Traditional Publication Rule, Australian Approach; and
(c) approaches that completely modify the Traditional Publication Rule ("Novel Approaches"): Bright Line Rule, Adoption/Endorsement Rule.

From the table above, one observation that can be made is that there has been a general shift towards a more publisher-centric inquiry. For the Novel Approaches, the focus is solely on the actions of the publisher as it looks only at the publisher's use of hyperlinks, or whether the publisher had endorsed/adopted the defamatory material. It does not inquire whether the defamatory material has been read by a third party. For the Revised Approaches, more requirements need to be satisfied before one is deemed a publisher. This part aims to highlight the gradual shift towards a publisher-centric inquiry and explain the conceptual challenges associated with this shift.

A. *Traditional Approach*

The approach taken by Abdullah J in *Leong Sze Hian* provides the most conceptual clarity, insofar as it accords with the foundational principles underlying publication. In particular, the court was more concerned with whether the defamatory material had been conveyed as a matter of fact as opposed to the nature of the defendant's actions. This is most evident at [43] of *Leong Sze Hian* where Abdullah J commented that:

> This implies that a Facebook post which carries a link, and which makes the defamatory statement available, would count as a publication if it could be established that third parties had accessed that link. In contrast, and subject of course to the precise facts, a hypothetical Facebook post that merely referred or alerted other users to the existence of the original defamatory statement, without carrying a link, might not count as publication. I do note that it is perhaps easier for a Facebook user to post or share a link to the original statement than to compose and type out an entirely new statement alerting others to the original, but such ease of posting or sharing cannot rescue a post from being publication for the purposes of defamation.[172]

While Abdullah J acknowledged that it was easier for the defendant to post a link than to write a reference,[173] the fact that a link makes the defamatory content more

---

[172] *Leong Sze Hian*, *supra* note 31 at [43].
[173] *Ibid*.

accessible to the reader means that a link is more likely to result in publication.[174] Noticeably, this represents a *reader-centric* perspective, analysing the effect of the alleged publisher's actions on the reader as opposed to how much effort was put in by the alleged publisher. The substantive requirements of Singapore's approach also largely mirror that of the Traditional Publication Rule.

B. *Revised Approaches: Shift to a Publisher-Centric Inquiry?*

In contrast, the formulation of the Revised Approaches demonstrates a clear shift towards a *publisher-centric* inquiry. Preliminarily, both approaches retain the reader-centric requirements as it must still be shown that a third party had minimally accessed the material.[175] However, both the Australian Approach and Deschamps J's revised publication rule add further requirements regarding the *nature* of the publisher's actions. Deschamps J's approach requires a "deliberate" act,[176] while the Australian Approach requires an "intentional" act.[177] The Australian Approach further imports a requirement of participation/assistance/contribution which examines the nature and extent of the defendant's actions in the publishing of the defamatory material.[178] From Kiefel CJ's reasoning in *Defteros*, this requires that the defendant approved, endorsed or adopted the defamatory content.[179]

However, in so far as these approaches have been justified on the basis that the Traditional Publication Rule required a "voluntary act", it is submitted that they represent a leap from prior case law. As earlier mentioned, the definition of an "involuntary" act in traditional publication law has always been very narrowly circumscribed, and only established where a third party had intervened.[180] In contrast, the Revised Approaches require a higher threshold of showing that the defendant's acts were not passive and under the Australian Approach, contributed in some manner to increasing the accessibility of the defamatory material. Admittedly, the need to show some form of participation or deliberate act by the Internet intermediary might be necessary as *evidence* supporting an act of communication by the Internet intermediary rendering the defamatory material available. This is important in helping to ascertain that the Internet intermediary played a role in communicating the defamatory material, and that the reader did not access it *via* other means. Nevertheless, these additional requirements risk altering the publication limb from one traditionally focused on the *result* of the defendant's action (*ie*, the fact of communication),[181] to one that is more focused on the *process* leading up to this result. It risks distorting

---

[174] *Ibid*.

[175] *Crookes*, *supra* note 3 at [100]; *Defteros*, *supra* note 17 at [130]. It should be pointed out that there is a subtle difference in threshold as Deschamps J's approach requires that the reader actually "understood" the material, while the Australian Approach only requires proof that the defamatory material had been "accessed in a comprehensible form."

[176] *Crookes*, *supra* note 3 at [100].

[177] *Defteros*, *supra* note 17 at [130].

[178] *Ibid*.

[179] *Ibid* at [45].

[180] See also *Gatley*, *supra* note 7 at [07-017]-[07-018].

[181] Jan Oster, "Communication, Defamation and Liability" (2015) 35(2) LS 348.

the inquiry from one that seeks to find out *whether* the harm has eventuated, to one that centres on *how* the harm eventuated. Putting aside the substantive requirements of these approaches, perhaps the most obvious change is to the nature of the publication inquiry from one that is *reader-centric* to one that is *publisher-centric*. The bulk of the analysis in *Crookes* and *Defteros* centred around the actions and role of the alleged publisher, a large shift from the traditional publication inquiry that centres on whether communication of the defamatory material to a third party had in fact taken place. Noticeably, this also resulted in more defendant-friendly tests which have more onerous requirements for plaintiffs to establish. This is somewhat ironic, considering how the Internet has greatly increased the reach and impact of any individual idea or expression,[182] and how hyperlinks have revolutionised the speed at which defamatory material can spread.[183] One may assume that there is a larger need to protect plaintiffs from harm to reputation under such circumstances. However, the Revised Approaches seem to have gone in the opposite direction.

C. *Rejection of the Novel Approaches*

Lastly, as evinced from case law, the Novel Approaches have not found favour in other jurisdictions. The bright line rule provides the greatest deviation from the Traditional Publication Rule as it rejects any possibility of a hyperlinker being deemed a publisher. In both *Defteros* and *Leong Sze Hian*, the courts have rejected the approach laid down by Abella J.[184] The judgment by the majority in *Crookes* has also been heavily criticised by academics. The fact that the majority approach is grounded in analogy to "references" is inherently problematic as it fails to appreciate a hyperlink's ability to facilitate access to the referred information.[185] As Professor Gary Chan explains, this inflexible rule also ignores the potentially variegated contexts and technological means through which the hyperlinked material may be conveyed to a third party.[186] It has also been pointed out that such an approach might even have the contrary effect of diluting the defendant's free speech on the Internet.[187] While some have praised the approach for promoting certainty in the law,[188] it is submitted that clarity cannot come at the expense of adequacy. The majority approach should rightfully be confined to the unique balance struck between freedom of speech and protecting reputational damage in Canada, premised on rights enunciated in the Canadian Charter of Freedom.[189] McLachlin CJ's approach, the adoption/endorsement standard, is a slight deviation from Abella J's approach and lays down a very narrow circumstance where a hyperlinker may be liable. However, McLachlin CJ's approach also represents a big deviation from the Traditional Publication Rule because it does not focus on the bilateral nature of

---

[182] *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [1] (HC).
[183] *Crookes*, *supra* note 3 at [37]. See also Dalal, *supra* note 2 at 1019, 1021.
[184] *Defteros*, *supra* note 17 at [41]; *Leong Sze Hian*, *supra* note 31 at [41].
[185] Gould, *supra* note 37 at 160.
[186] Chan, "Defamation via Hyperlinks", *supra* note 67 at 347.
[187] *Ibid* at 348.
[188] Fischer & Lazier, *supra* note 32 at 214.
[189] Crookes, *supra* note 3 at [33].

publication. Instead, it only looks at the actions of the alleged publisher. It is perhaps for this reason that McLachlin CJ's approach has also not been adopted in subsequent judgments of other jurisdictions. In summary, the essence of the publication inquiry has always been to show that the defamatory material has been communicated to a third party.[190] In developing new approaches, the courts in Australia and Canada risk fundamentally shifting the inquiry to one that focuses on the actions of the publisher. Nevertheless, the development of these approaches is understandable in light of the widespread liability that might result from applying the Traditional Publication Rule. Ultimately, how far the rule is altered also depends on the balance between freedom of speech and protection of reputation in a specific jurisdiction. This paper does not seek to prescribe a one-size-fits-all approach, but rather, to simply evaluate the normative desirability of these approaches, and point out that in formulating these approaches, one has to recognise that a shift from the traditional principles underlying defamation law has taken place.

V. Suggestions for Singapore Law Moving Forward

The approach in *Leong Sze Hian* largely retains the Traditional Publication Rule which, it is submitted, should continue to be the way forward for Singapore. With respect to concerns about widespread liability, this paper argues that a potential solution lies in the development of the innocent dissemination defence.[191]

A. *Foundation of the Innocent Dissemination Defence*

The defence of innocent dissemination developed in a bid to mitigate the harshness of the strict application of the Traditional Publication Rule.[192] Confusion has long existed as to the interaction between the defence and the publication limb.[193] The two doctrines are, however, conceptually separate.[194] This was succinctly explained by Justice R V A Riberiro in the following terms:

> [The doctrine of innocent dissemination] is a defence that relieves against the strict liability previously imposed on those playing a subsidiary role in the publication process, and is available to those who are not the first or main publishers provided that they do not know and would not, by using reasonable care have known, that the article contained the defamatory material.[195]

---

[190] Kirsty Horsey & Erika Rackley, *Tort Law*, 5th ed (Oxford: Oxford University Press, 2017) at 486-487.

[191] See also *Crookes*, *supra* note 3 at [114] where Deschamps J argues that: "If this defence were widely available, it should dissuade overeager litigants from having a chilling effect on hyperlinking on the Internet."

[192] *Voller*, *supra* note 103 at [36]; R A V Ribeiro, Permanent Judge, Hong Kong Court of Final Appeal, "Defamation and Internet Intermediaries", speech at Hong Kong Judicial Colloquium (2015) at [3].

[193] Ribeiro, *supra* note 192 at [4].

[194] *Thompson v Australian Capital TV Ltd* (1996) 186 CLR 574 at 586 (HC, Aust); Duncan & Neil, *supra* note 13 at 116-117.

[195] Ribeiro, *supra* note 192 at [29].

B. *Statutory Innocent Dissemination Defence*

Currently, the innocent dissemination defence in Singapore exists only in the common law.[196] The defence applies where: (a) the defendant did not know that the publication was libellous; (b) the circumstances or the work could not have alerted the defendant to the libellous content; and (c) that such ignorance was not due to his or her negligence.[197] One solution would be to incorporate the defence into statute under the Defamation Act and add further protection for alleged publishers.[198] Reference can be taken from s 1 of the Defamation Act 1996 in the United Kingdom.[199] In addition to the formulation of the defence at common law, the following suggestions can be considered.

1. *Scope of the defence*

First, the persons who the defence applies to need not be defined rigidly. At common law, the defence only applies to "subordinate" publishers but not main publishers.[200] As held in *Oriental Press Group v Fevaworks Solutions Ltd*, the determination of whether a person is a main publisher or subordinate publisher depends on the level of control that person has over the content.[201] If the person had the opportunity to prevent its dissemination, they do not qualify for the defence.[202] It is submitted that the criterion of control is a principled way of deciding who should be availed of the defence. A statutory defence of innocent dissemination should thus only be available to "subordinate" publishers, with the definition of a subordinate publisher determined by reference to a list of factors that affect the level of control over the defamatory material. This would provide more flexibility to determine who is a subordinate publisher, as opposed to prescribing a closed list of persons who can/cannot avail themselves of the defence.[203] In this respect, Parliament can also introduce statutory presumptions for groups of people that may be considered subordinate publishers. This would provide some clarity in terms of who the defence seeks to protect, without being overly rigid. For example, similar to the defendant in *Crookes*,[204] operators of websites where hyperlinks are frequently posted by users could be presumed to be subordinate publishers, unless it can be shown that they exercised some form of editorial control over the content.[205] Secondly, another

---

196 However, it should be noted that Electronic Transactions Act 2010 (2020 Rev Ed), s 26 provides for protection of network service providers.

197 *The Law of Torts in Singapore*, *supra* note 14 at [13.113] (citing *Vizetelly v Mudie's Select Library Limited* [1900] 2 QB 170 [*Vizetelly*]).

198 Defamation Act 1957 (2020 Rev Ed).

199 UK Defamation Act 1996, *supra* note 162, s 1.

200 *Oriental Press Group Ltd and another v Fevaworks Solutions Ltd* [2013] HKCU 1503 at [27] (Hong Kong, Court of Final Appeal) [*Oriental Press Group*] (citing *Vizetelly*, *supra* note 197 at 180).

201 *Oriental Press Group*, *supra* note 200 at [76], [85].

202 *Ibid* at [85].

203 See *eg*, UK Defamation Act 1996, *supra* note 162, s 1.

204 *Crookes*, *supra* note 3 at [5].

205 See *eg*, Defamation Act 2013 (c 26) (UK) s 5 [UK Defamation Act 2013] which applies to operators of websites.

statutory presumption that can be added is that search engines operators should be considered subordinate publishers, unless the contrary is proven.[206] Unlike an individual who provides a hyperlink on a social media post, the "publication" of a hyperlink by a search engine is fundamentally different. Search engine operators do not *prima facie* exercise editorial judgment or control prior to the publication of the defamatory output search.[207] The search engine operator arguably only controls the algorithms which generate the search results, but does not have knowledge of the contents of search results.[208] As stated in *Google Inc v Duffy*, because of the "extraordinary amount of material on the World Wide Web", "the inordinate number of searches" and "the close to infinite variations therein", it is unrealistic to attribute to the search engine knowledge of the contents of search results until some form of notice is given.[209] This can be contrasted with an individual posting a hyperlink, as the individual should know the contents of the hyperlink posted. Search engine operators should therefore be considered subordinate publishers, unless it can be shown that they had exercised an additional level of control in a particular case. These rebuttable presumptions help to ensure that control is not evaluated in an "all or nothing" fashion,[210] by allowing these presumptions to be displaced where appropriate. Lastly, for completeness, it should be mentioned that news agencies or reporters are unlikely to be covered by the defence as they exercise control over their content and are therefore unlikely to be considered subordinate publishers. It is thus worth briefly discussing the doctrine of neutral reportage. At present, it should be noted that the doctrine has yet to be conclusively accepted in Singapore. The *Reynolds* privilege,[211] for example, was rejected in *Review Publishing v Lee Hsien Loong* for non-citizens, but the court left the door open in respect of Singapore citizens.[212] Nevertheless, if this defence were available, it would also help to address issues of widespread liability. For this defence to apply, the defendant must have neutrally reported the attributed allegations without adoption, embellishment or subscribing to any belief in the truth of the allegations.[213] In the context of hyper-

---

[206] See *eg*, Chan, "Search Engines and Internet Defamation", *supra* note 7 at 339; *Dr. Yeung Sau Shing Albert v Google Inc* [2014] 5 HKC 375 (HC, Hong Kong). See generally Gary Chan Kok Yew, *Tort of Defamation Before the Singapore Courts 1965 – 2015: A Comparative and Empirical Study* (Singapore: Academy Publishing, 2017) at [5.36] for a discussion on the two main camps representing the pro-publication and anti-publication views with respect to the liability of search engines.

[207] Chan, "Search Engines and Internet Defamation", *supra* note 7 at 339. But see Jerrold Soh, *supra* note 91 at 593 where the author highlights how some cases have held that algorithm developers can be publishers as they intentionally design, develop and deploy the algorithm.

[208] *Google Inc v Duffy* [2017] SASCFC 130 at [183] (SC, SA) [*Google v Duffy*].

[209] *Ibid* at [183]-[184].

[210] Chan, "Search Engines and Internet Defamation", *supra* note 7 at 340. See *Oriental Press Group*, *supra* note 200 at [76].

[211] There are differing views on whether the doctrine of reportage is a subset of the *Reynolds* privilege. See *eg*, *Roberts v Gable* [2008] QB 502 at [60] [*Roberts v Gable*]. *Cf* Jason Bosland, "Republication of Defamation under the Doctrine of Reportage" (2011) 31(1) Oxford J Leg Stud 89 at 91-92.

[212] Foo Cechao, "Protection from Online Falsehoods and Manipulation Act and the Roles of Internet Intermediaries in Regulating Online Falsehoods" (2021) 33 SAcLJ 438 at [74] (citing *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [175]-[188] (CA)).

[213] Cechao, *supra* note 212 at [75] (citing *Roberts v Gable, supra* note 211 at [53]). The defence of reportage has since been enshrined in statute under UK Defamation Act 2013, *supra* note 205, s 4(3). See Low Kee Yang, "UK Defamation Act 2013: Key Changes" (2014) 26 SAcLJ 98 at [22]-[23].

links, a news agency that, for example, posts a hyperlink to defamatory material as part of a news report, will likely be considered a publisher if the Traditional Publication Rule is applied. The defence of neutral reportage may then apply if it can be shown that the defendant had neutrally reported the attributed allegations.[214] This would likely depend on the words used in the news report, or in the context of a social media post, the texts accompanying the hyperlink in the post.

2. *Refining of substantive requirements*

Another suggestion is to refine the substantive requirements of the defence to allow for a more nuanced consideration of the circumstances to be undertaken. In particular, in a situation where the defendant has been notified that the publication was libellous,[215] the defendant might be prevented from relying on the defence if they do not take the defamatory material down immediately as the defendant would not be able to argue that they did not know that the publication contained libel, or that such ignorance was not due to any negligence.[216] However, in respect of large companies like Google and Facebook, consideration must be given to the size of these companies and the volume of reports they receive on a daily basis.[217] This can be contrasted with a notification to a person who posts a hyperlink to the defamatory material on his social media account. That individual can immediately respond to being notified. One potential solution is to provide a non-exhaustive list of factors for the court's consideration when determining whether the defence is made out, including: (a) whether an agent of the defendant had been notified; (b) how widespread the publication was; (c) the scale of the defendant's operations;[218] and where applicable, (d) upon acquiring knowledge of the libel, steps taken to prevent further dissemination of defamatory material. This would make it clear that the act of notifying the defendant would not *ipso facto* prevent the defendant from relying on the defence. Rather, it is merely a factor the court may take into consideration. This further ensures that the defendant would not be unfairly deprived of the defence, and also encourages publishers to swiftly take steps to remedy the situation where possible.

Another possible solution is the implementation of specified mechanisms for platforms to follow when a complaint about potentially defamatory material has been posted. This concept has been applied in the United Kingdom and has been proposed under Part A of the Stage 2 Review of Model Defamation Provisions in

---

[214] See *Roberts v Gable*, *supra* note 211 at [61] where the court listed out a range of factors to be considered in determining whether there is a defence on the ground of reportage.

[215] See *eg*, *Tamiz v Google Inc* [2013] 1 WLR 2151 (CA, Eng) [*Tamiz*]; *Duffy v Google LLC* [2023] SASC 13 (SC, SA).

[216] *Tamiz*, *supra* note 215 at [34].

[217] See *eg*, Guy Rosen, "How We're Tackling Misinformation on our apps", online: *Morning Consult* <https://morningconsult.com/opinions/how-were-tackling-misinformation-across-our-apps/>. In this blog post in 2021, the vice president of integrity at Facebook Inc. revealed that Facebook had built a global network of more than 80 independent fact-checkers to tackle misinformation.

[218] Chan, "Search Engines and Internet Defamation", *supra* note 7 at 340.

Australia.[219] This could, for example, require social media platforms to temporarily take down posts with hyperlinks to defamatory material for 48 hours and inform the user who posted the defamatory material about the complaint. If the user who posted the hyperlink does not respond within a specified time, the post can be deleted.[220] If the poster wishes to keep the hyperlink up, the platform could provide the poster's details to the complainant if consent is given. Only if the website operator or social media platform complies with this, will a defence be available to them.[221] This would strike a fair balance between freedom of speech and protection to reputation as it prevents all posts from being taken down permanently due to mere unsubstantiated complaint, while also giving the complainant an avenue to attain redress. It would also encourage large companies with the resources to perform content moderation to respond to complaints of defamatory content being posted. By making these modifications, the contours of the innocent dissemination defence will be more clearly defined. In enacting a statutory defence for innocent dissemination, Parliament would also be given more latitude to regulate online platforms and strike the ideal balance between freedom of speech and protection of reputation it seeks to achieve.

C. *Overall Suggestions for Singapore Law*

To summarise, in dealing with defamation *via* hyperlinks, Singapore should retain the Traditional Internet Publication Rule that primarily focuses on whether the defamatory material had been conveyed to a third party. This approach accords with the fundamental principles of publication and protects reputation in an age where defamatory material can be communicated at record speeds. The approach in *Leong Sze Hian*, aside from the potential reference to incorporation, should also be followed. In particular, the courts should maintain a *reader-centric* approach towards the issue of publication.[222] Lastly, concerns about widespread liability can be addressed *via* the development of a local statutory innocent dissemination defence. The following two hypotheticals illustrate how such an approach might operate.

1. *Hypothetical 1: Original post disagrees with defamatory content*

First, consider a situation where there is direct evidence that a third-party reader followed a link in the original post to the defamatory text. However, the accompanying text in the original post clearly disagrees with the defamatory content. To illustrate

---

[219] UK Defamation Act 2013, *supra* note 205, s 5. See also New South Wales Government, *Attorneys-General Review of Model Defamation Provisions – Stage 2* (Discussion Paper), online: *NSW Government* <https://dcj.nsw.gov.au/documents/about-us/engage-with-us/public-consultations/review-model-defamation-provisions/discussion-paper-stage-2.pdf>.

[220] Ministry of Justice, *Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations*, online: *Ministry of Justice* <https://assets.publishing.service.gov.uk/media/5a7c606440f0b626628aba0b/defamation-guidance.pdf>.

[221] UK Defamation Act 2013, *supra* note 205, s 5.

[222] See especially *Leong Sze Hian*, *supra* note 31 at [43].

using the earlier example again, take for instance a post that writes: "I completely disagree! Click this link and see for yourself", with a link attached to a defamatory article. Following the approaches in Canada and Australia, varying results are achieved. Under McLachlin CJ's approach it would not be considered published as it does not approve or endorse the defamatory material.[223] Similarly, under the Australian Approach, Kiefel CJ's formulation specifically, it would likely not be considered published as it does not approve or encourage the reading of the defamatory material.[224] Only under Deschamps J's approach would the defamatory content be considered published. Following the Traditional Publication Rule, the material would still be considered published because the defendant committed a voluntary act that resulted in a third party reading the defamatory material. However, liability might nevertheless not result because the requirement of defamatory meaning may not be met. It is trite law that defamatory material must be read both in light of the context in which it appeared and the mode of publication.[225] Considering how the reader must view the original post before the defamatory material, the contents of the original post would neutralise the content of the defamatory material as it expresses the user's clear disagreement with the defamatory material. In such a situation, the words of the original post would serve as the "antidote" to the defamatory material and prevent the user from liability, albeit under a different element required to establish the tort of defamation.[226] While not all situations would be as clear cut, liability in such situations would ultimately be determined by the law on defamatory meaning, as opposed to the law on publication. This approach is preferable because first, it is more principled and does not involve "stretching" the concept of publication beyond a factual inquiry. Second, the well-established principles which the courts have developed to ascertain defamatory meaning are a lot more suitable to address such a situation.

2. *Hypothetical 2: Change of hyperlinked content*

The second example would be a situation where the defendant posts a hyperlink to a website that is initially neutral, but the content is later changed to contain defamatory material without any notice given to the defendant. This example was cited by Abella J when she criticised the deficiencies of the Traditional Publication Rule and formulated her bright-lined approach.[227] Under the Traditional Publication Rule, such a situation would likely be caught as the action of posting the hyperlink was voluntary and this action caused the material to be published to a third party. However, in such a situation, the innocent dissemination defence could be applicable to protect the defendant. Here, the defendant, having no control over the hyperlink content, would likely be considered a subsidiary publisher. The defendant

---

[223] *Crookes*, *supra* note 3 at [50].

[224] *Defteros*, *supra* note 17 at [45].

[225] *Panagiotis Koutsogiannis v The Random House Group Ltd* [2020] 4 WLR 25 at [12] (HC, Eng). See also *Gatley*, *supra* note 7 at [03-013].

[226] *Charleston*, *supra* note 159.

[227] *Crookes*, *supra* note 3 at [27].

in this case would also likely be able to argue that he/she did not know that the publication was libellous, that the circumstances or the work could not have alerted him/her to the libellous content; and that such ignorance was not due to his/her negligence. Thus, while the defendant would still be considered to have published the defamatory material, the innocent dissemination defence would be available to the defendant. In this manner, the innocent dissemination defence can help to ameliorate the harshness of applying the Traditional Publication Rule to Internet defamation, and allay concerns of widespread liability. These two examples seek to illustrate that the Traditional Publication Rule, together with a robust defence of innocent dissemination, can provide sufficient tools to cope with the challenges of widespread liability posed by Internet defamation. The first example shows how a different element of the defamation inquiry can be used to address concerns about liability, while the second example shows how the defence of innocent dissemination can address concerns raised by Abella J in *Crookes* about the application of the Traditional Publication Rule. The result of no liability for the defendant in both examples under this approach is similar to that under the Australian and Canadian approaches, except that in both cases the defendant would clearly be considered a "publisher". While the Australian and Canadian approaches have developed to mitigate the harshness of the Traditional Publication Rule applied to Internet defamation, it is submitted that a similar effect can be achieved by the enactment of a statutory defence of innocent dissemination and without sacrificing doctrinal clarity.

VI. Conclusion

Questions of "old law meets the internet" are not unique to the law of defamation.[228] Similar issues arise in the law of contract, intellectual property and privacy, and more.[229] Changes in our approach to such issues are inevitable, but must not distort time-tested principles. The use of hyperlinks indeed poses issues of widespread liability, though this issue is not a novel one. Similar concerns were raised with the rise of print media, television and the Internet more generally. As argued in this paper, the courts in Australia and Canada have opted to modify the Traditional Publication Rule to one that is an increasingly publisher-centric inquiry. However, this fundamentally deviates from the nature of the publication and creates conceptual issues. In Singapore, the High Court in *Leong Sze Hian* chose not to follow this approach, and instead opted to, in large part, deal with the issue of hyperlinks in a "back to basics" fashion, by reference to the Traditional Publication Rule. Such an approach is preferable and sets the stage for a principled development of the law in dealing with the issue of defamation *via* hyperlinks.

---

[228] Gould, *supra* note 37 at 137.
[229] *Ibid*.