

Jade Buchanan is an intellectual property and information technology lawyer and trademark agent with MacPherson Leslie & Tyerman LLP. He focuses on the protection, acquisition and commercialization of software, hardware and other technology and IP assets. His experience includes all aspects of trademark and copyright law, software development and licensing,

and internet law for clients in a number of industry sectors. He also regularly advises entrepreneurs and technology start-ups on a broad range of legal issues.]

¹ [2015] B.C.J. No. 1193, 2015 BCCA 265 (B.C.C.A.).

² [2015] B.C.J. No. 1270, 2015 BCCA 279 (B.C.C.A.).

³ R.S.B.C. 1996, c. 373.

• WITH FRIENDS LIKE THIS... RECENT FACEBOOK DEFAMATION CASE CAUTIONS ALL ONLINE USERS •

David A. Crerar, Partner, Borden Ladner Gervais LLP
© Borden Ladner Gervais LLP, Vancouver.



David A. Crerar

Facebook users who angrily vent to online friends may think that they live in a magic bubble free of liability for defamation. In fact, given the ease and encouragement of sharing on Facebook and other social media, the risk of harm, and subsequent substantial legal damages, may be greater than with defamatory statements in more conventional forms. Further, defamation-spewing Facebook users may well wear liability for the comments made by others on their own Facebook pages, in inadvertently acting as a publisher of those comments. The defendant in *Pritchard v. Van Nes* learned these lessons the hard way, and gave the Court the opportunity to provide useful guidance on such disputes in future.¹ The judgment may prompt readers of this Alert to frantically review and remove some of their more inflammatory Facebook or other social media postings made at times when their guards were down.

The parties in *Pritchard* were long-feuding neighbours living in Abbotsford, British Columbia. The dispute flowed from the noise of the defendant's fishpond waterfall, a defecating dog, parking intrusions, municipal complaints and other neighbourly aggravations. From time to time the plaintiff took cell phone photographs and videos of the offending activities. The defendant complained on her Facebook page about the videotaping. The post included the comment, "*Now that we have friends living with us with their 4 kids including young daughters we think it's borderline obsessive and not normal adult behavior... Not to mention a red flag because Doug works for the Abbotsford school district on top of it all!!!!*"

As is not unusual on Facebook, the defendant's friends posted a series of supportive comments and replies (48 in total), to which the defendant herself replied. Many of the friends' comments made overt the defendant's original innuendo that the plaintiff was a paedophile, calling him a "pedo", and "creep", and urging police complaints and other actions.

One of the defendant's Facebook friends wrote "*why don't we let the world know?*"; he stated that he would 'share' the posting on his own Facebook page and he encouraged others to do so as well. The next day, this helpful friend wrote a letter to the principal of the school where the plaintiff taught music, referring to him as a "potential paedophile" and urging the principal to take action.

The school dismissed the allegations, and the defendant took all of the postings down within 28 hours. But the damage had been done: the plaintiff was mortified, was dispirited in his teaching, and was the subject of gossip and avoidance among neighbours and school parents.

It will likely not surprise readers that the court found the defendant liable for her own comments. The Court noted that the comments were potentially published to the defendant's 2,059 Facebook friends, as well as to the friends of those friends. Further, as the defendant had loose privacy settings, the comments were potentially published to the entire Facebook universe.

What may be more chilling for Facebook users is the Court's finding that the defendant was also liable for the actions of her friends. Generally, one is not responsible for the republication or repetition of one's defamatory statements by others, unless that repetition was the natural and probable result of the initial statement. The Court noted that Facebook's design and architecture facilitates and encourages the forwarding and sharing of comments, creating a natural and foreseeable ripple effect of repetition beyond the original post. As stated by Justice Saunders, "*the nature of Facebook as a social media platform and its structure mean that anyone posting remarks to a page must appreciate that some degree of dissemination at least, and possibly widespread dissemination, may follow.*" The defendant was thus liable for her friend's defamatory statements, in two ways.

First, the defendant was found liable for her helpful friend's sharing of her post and complaint to the school principal: both ought to have been foreseeable to the defendant and both flowed from her original posting. The friend had indicated that he would "tell the world", and her silence amounted to a tacit approval of that republication.

Second, the defendant was liable for her friends' defamatory comments posted on her Facebook page. The defendant knew that her Facebook page contained defamatory statements posted by her friends, and she did nothing to stop or remove them although she could have. In effect, by allowing the defamatory comments

to remain on her Facebook page (and indeed, by continuing to participate in the ongoing online series of comments and replies), she encouraged, endorsed, and published those defamatory comments.

The Court found that a Facebook or similar user should only be liable in such situations where the original post is inflammatory and expressly or implicitly invites defamatory comment by others, or where the user actively participates, through comments and replies, in such a dialogue.

The Court awarded \$50,000 in general and \$15,000 in punitive damages, noting that an allegation of paedophilia is most devastating against a teacher.

The case will apply well beyond Facebook, to other forms of social media and websites. Its lessons are of wide application.

Advice for users of Facebook and other social media:

- Treat everything that you say on the internet or email as if you were publishing it on the cover of a national newspaper or broadcasting it on the news: the internet is not a liability-free zone.
- Be careful of defamatory comments from Facebook friends or website readers: you can face liability for allowing them to remain online, especially when endorsing or agreeing with them.
- If your internet writing style toes the line with defamatory comments, tighten your privacy settings to limit the numbers and identities of those who can read them.
- If in doubt, take down the offending comment or reply. The longer it is up, and the more widespread it is read and copied, the greater the damages.
- Review your Facebook page or social media postings or blog or website for past defamatory comments by yourself or others: a social-media audit may be prudent.

Pritchard may cause heart palpitations for those who do post or have posted inflammatory comments on Facebook or other social media. The *Pritchard* court, however, reaches this result through the application of well-established legal principles in defamation, as well as a commonsensical recognition

of how an internet posting can go viral, with devastating effects. One can expect such lawsuits to increase given this useful case precedent confirming these principles.

[**David A. Crerar** is a partner in the Commercial Litigation Department in the Vancouver office of Borden Ladner Gervais LLP. He also serves

an adjunct professor at the University of British Columbia, Faculty of Law. His practice focusses on internet, defamation, banking and pension litigation.]

¹ [2016] B.C.J. No. 781, 2016 BCSC 686 (B.C.S.C.) [Pritchard].

INVITATION TO OUR READERS

**Do you have an article that you think would be appropriate for
Internet and E-Commerce Law in Canada and that you would like to submit?**

**Do you have any suggestions for topics you would like to see featured in future issues
of *Internet and E-Commerce Law in Canada*?**

**If so, please contact Professor Michael A. Geist
at <mgeist@uottawa.ca> or <ieclc@lexisnexis.ca>.**