COURT OF APPEAL FOR ONTARIO

CITATION: J.K. v. The Korea Times & Hankookilbo Ltd. (The Korea Times Daily), 2016 ONCA 375
DATE: 20160518
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Laskin, Hourigan and Brown JJ.A.

BETWEEN

J.K. and S.K.

Plaintiffs
(Appellants)

and

The Korea Times & Hankookilbo Ltd. carrying on business as The Korea Times Daily and carrying on business as Korean Entertainment Weekly, Young Kwon Cho and Jay Jung

Defendants
(Respondents)

Peter Downard and Fida S. Hindi, for the appellants

Bruce McEachern, for the respondents

Heard: April 15, 2016

On appeal from the order of Justice Darla A. Wilson of the Superior Court of Justice, dated June 2, 2015.

Hourigan J.A.:

A. OVERVIEW

[1] The appellants, J.K. and S.K., appeal the order of the motion judge dismissing their defamation claims for failure to comply with the notice provision contained in s. 5(1) of the *Libel and Slander Act*, R.S.O. 1990, c. L.12.

[2] For the reasons that follow, I would allow the appeal. In my view, the motion judge erred in law in her analysis of the sufficiency of the notice in issue, including by failing to consider the notice in the context of all of the surrounding circumstances.

[3] A proper analysis of the notice makes plain that it conveyed to the respondents the essence of the matter complained of so that they could take appropriate steps to mitigate any damages, if they chose to do so. Therefore, it complied with the notice provision in the *Libel and Slander Act.*

B. FACTS

[4] The appellants are two young Korean women who came to Canada to study. They made complaints to the police that they were victims of repeated sexual and physical assaults and other crimes by members of their church group. The crimes were allegedly perpetrated by nine people over a twelve-month period.

[5] As a consequence of the appellants' allegations and the allegations of three other women, criminal charges were laid. The Korean press, both in Canada and Korea, reported on the charges and the subsequent court appearances.

[6] On October 17, 2011, prior to the conclusion of the preliminary hearing, the Crown decided to withdraw the charges on the basis that there was no reasonable prospect of conviction.

[7] The next day, the withdrawal of the charges was the subject of a front-page news article authored by the respondent, Jay Jung, entitled "The Truth Has Finally Won" in the *Korea Times Daily,* a newspaper owned by the respondent The Korea Times & Hankookilbo Ltd. ("Korea Times"). In the article, the appellants were identified by name as complainants in the criminal proceedings. The article alleges that the appellants' criminal complaint was "a fabricated case".

[8] In the same issue, the respondent editor Young Kwon Cho published an opinion column on the withdrawn charges entitled "The Truth Came Out In This Way". Two days later, an article written by Mr. Jung about the case was published in *Korean Entertainment Weekly*, a publication that is also owned by Korea Times, entitled "Young Church Members Free From False Charges".

[9] All three articles, which were written in the Korean language, contained statements that the charges against the accused were fabricated.

[10] On November 22, 2011, the appellants' counsel, J. David Sloan, wrote to the *Korea Times Daily* and *Korean Entertainment Weekly*. In that letter, counsel indicated that he represented the appellants and identified the articles in issue. He alleged a breach of the publication ban made in the criminal proceedings because there were specific references identifying the appellants in the articles.

[11] In the letter, counsel for the appellants also purported to provide notice of the appellants' defamation claim:

> Indeed, the entire tenor of the articles contained in your publications, which were at pages identified as A1, A3 and A4 on Tuesday, October 18, 2011 and in the October 21 edition of the Korean Times Daily as well as the October 21 edition of the Korean Entertainment Weekly of the Korean Times were totally improper as well as being defamatory and malicious in nature.
>
> It is quite clear that the purpose behind the articles and the words printed was an attempt to harm my clients and their reputation.
>
> As a result, notice is hereby given to you that an action will be brought for damages pursuant to the provisions of the *Libel and Slander Act* as a result of the defamation of these two ladies. In addition, there will be included a claim for punitive and aggravated damages by reason of the breach of the publication ban and the extreme agony and embarrassment that you have caused these two ladies by the publication of their names, contrary to the Criminal Code of Canada.

[12] The respondents published no retraction, apology, or correction. The appellants issued their statement of claim seeking damages for defamation and for breach of the publication ban.

[13] The respondents defended the action, pleading as follows, at para. 24:

> LIMITATION PERIOD
>
> The Defendants deny that the notice provided on behalf of the Plaintiffs pursuant to the *Libel and Slander Act,* R.S.O. 1990, Chap. L 12, constituted proper notice of libel, as it did not sufficiently specify the matters complained of, given what was subsequently alleged in the Amended Statement of Claim. As such the claims in the Amended Statement of Claim which extend beyond the matters complained of in the said libel notice are statute-barred. The Defendants plead and rely upon s. 5(1) of the Act.

[14] The case proceeded through discovery and pre-trial proceedings over the course of approximately three years. At examinations for discovery, counsel for the appellants asked about para. 24 of the respondents' statement of defence. Counsel for the respondents replied that the notice should have particularized the allegedly libellous words complained of and that his position was that the notice was a breach of s. 5(1) of the *Libel and Slander Act*.

[15] The action was set down for a three to four week jury trial to commence on June 1, 2015. On May 29, 2015, the respondents served a notice of motion to the trial judge, returnable June 1, 2015, seeking, among other things, an order dismissing the appellants' defamation claims for failure to comply with s. 5(1) of the *Libel and Slander Act.* Nowhere in the notice of motion is there any reference to the rule relied upon. Presumably, the respondents moved under Rule 21 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194.

[16] The motion judge granted the motion and dismissed the appellants' defamation claims. She held that the notice was deficient because it put the respondents in a position where they would have to guess at what statements were alleged to be defamatory.

C. ANALYSIS

(i) Legal Principles

[17] Subsection 5(1) of the *Libel and Slander Act*, provides:

> **Notice of action**
>
> No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

[18] If s. 5(1) is applicable, compliance is a condition precedent to bringing an action in libel such that failure to provide adequate notice will bar the action: *Grossman v. CFTO-T.V. Ltd. et al.* (1982), 39 O.R. (2d) 498 (C.A.), at p. 501, leave to appeal refused (1983), 39 O.R. (2d) 498 (note) (S.C.C.); *Misir v. Toronto Star Newspapers Ltd.* (1997), 105 O.A.C. 270 (Ont. C.A.), at p. 273.

[19] A review of the authorities considering s. 5(1) of the *Libel and Slander Act* reveals the following principles:

i. There is no prescribed form of notice. The notice must identify the "matter" complained of and need not

describe the "statement" complained of or specify the exact words: *Grossman*, at pp. 501-502.

ii. Notices need not contain the same level of particularity as a statement of claim: *Canadian Union of Postal Workers v. Quebecor Media Inc.*, 2016 ONCA 206, at para. 5; *World Sikh Organization of Canada v. CBC/Radio Canada*, 2007 CarswellOnt 7649 (S.C.), at para.12.

iii. The adequacy of the notice must be assessed in the light of its purpose: *Shtaif v. Toronto Life Publishing Co.*, 2013 ONCA 405, 366 D.L.R. (4th) 82, at para. 57.

iv. The purpose of the notice is to call the publisher's attention to the alleged libellous matter, so that the publisher may investigate and, if it deems it appropriate, publish a retraction, correction, or apology. This will permit the publisher to reduce or eliminate any damages: *Grossman*, at p. 501; see also *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2005), 256 D.L.R. (4th) 407 (Ont. C.A.), at para. 38; *Siddiqui v. Canadian Broadcasting Corp.* (2000), 50 O.R. (3d) 607 (C.A.), at para. 16, leave to appeal refused (2001), 271 N.R. 196 (note) (S.C.C.); and *Canadian Union of Postal Workers*, at para. 6.

v. The appropriate test for the sufficiency of the notice is whether the notice fairly brings home to the publisher the matter complained of to permit the publisher to review the matter and decide how to respond: *Grossman*, at pp. 504-505; see also *Siddiqui*, at para. 18; *Canadian Union of Postal Workers*, at para. 6; *Gutowski v. Clayton*, 2014 ONCA 921, 124 O.R. (3d) 185, at para. 36; and *Shtaif* at para. 58.

vi. Courts can assess the adequacy of the notice in the light of all of the surrounding circumstances: *Grossman*, at p. 505; see e.g. *Pringle v. Channel 11 Limited Partnership*, 2015 ONSC 2699, at paras. 20-22; *Boyer v. Toronto Life Publishing Co.* (2000), 48 O.R. (3d) 383 (S.C.), at paras. 17-19.

vii. A plaintiff may also benefit from the notice, because a timely correction, retraction, or apology may constitute a better remedy than damages: *Grossman*, at p. 501.

viii. There is a preference in the case law to have matters determined on the merits, rather than terminating them on technical grounds: see *Grossman*, at p. 505; *Telegram Printing Co. v. Knott*, [1917] 55 S.C.R. 631, 3 W.W.R. 335, at p. 342; *Sentinel-Review Company Limited v. John R. Robinson*, [1928] S.C.R. 258, at pp. 262-63; *Pringle*, at paras. 33-34; *Boyer*, at para. 19.

[20] In summary, in considering the adequacy of a notice, the court must have regard to the purpose of s. 5(1) and the circumstances of the particular case to determine whether it fairly alerts the publisher to the matter complained of, so that the publisher may take appropriate action.

[21] In conducting this analysis, the court must be careful to ensure that the notice provision is not abused to shield publishers from legitimate defamation claims. Subsection 5(1) of the *Libel and Slander Act* was not enacted to reward publishers who are deliberately obtuse. Rather, it is designed to ensure that publishers have sufficient information to permit them to take appropriate steps to mitigate or to eliminate potential damages, if they choose to do so.

(ii) The Principles Applied

[22] In my view, the motion judge erred in her application of these legal principles in her analysis of the sufficiency of the notice. She repeatedly (at paras. 21 and 26-27 of her reasons) referred to the fact that the notice failed to specify the impugned phrases. There was, of course, no obligation on the part of

the appellants to cite the specific statements complained of in the notice. All that had to be conveyed was the matter complained of.

[23] The motion judge also noted, at para. 26, that the statement of claim provided more detail regarding the alleged defamatory statements. This is hardly surprising as, unlike the notice, the statement of claim in a libel action must specify the precise words that form the basis of the claim.

[24] These errors taken alone are not necessarily fatal, but they reflect a narrow approach that is inconsistent with the case law, which shows a preference for cases to be determined on the merits and not dismissed for technical reasons where a publisher has the required information.

[25] Compounding this error in the motion judge's analytical approach is her failure to consider all of the surrounding circumstances to determine whether the notice brought home the matter complained of. Instead, her focus was primarily on the text of the notice compared to what was pleaded in the statement of claim.

[26] The motion judge also erred in her application of this court's decision in *Siddiqui.* At issue in *Siddiqui* was a broadcast that reported on an exclusive business arrangement between a travel company operated by the plaintiff and a charity. The content of the *Siddiqui* broadcast conveyed several distinct defamatory meanings, including that: (i) the travel agency was profiting unreasonably from what in effect is public money; (ii) that the travel agency was

a party to a rebate agreement with the charity pursuant to which the rebates were not recorded in the proper way, so that it was unknown where the money goes; (iii) that a kickback scheme may have been in place between the travel agency and the charity; and (iv) that the plaintiff and the travel agency had offered unauthorized discounts on Air Canada flights, had been cut off by Air Canada from booking seats on the airline, and were being sued by Air Canada.

[27] The *Siddiqui* libel notice identified the date of the television broadcast, complained that the broadcast was slanderous of the plaintiff, and stated the plaintiff's intention to sue. This court concluded that a reasonable recipient of the notice could not know which of the distinct defamatory stings conveyed by the broadcast were complained of. In the present case, the libel notice was similarly vague. However, the context is much different because the three articles complained of in this case conveyed a single defamatory sting which was plain on the face of the articles, i.e. that the appellants fabricated the criminal charges against the nine accused. Therefore, this case is distinguishable from *Siddiqui,* which involved multiple distinct defamatory stings. The motion judge erred in failing to take this context into account and in concluding that upon receipt of the notice the respondents could not know the essence of the case against them.

[28] The cumulative effect of these errors is that the motion judge erred in law in her analysis of the sufficiency of the notice. This court is therefore obliged to consider the issue anew, namely, whether in all of the circumstances the notice

fairly alerted Korea Times to the matter complained of, so that it could take appropriate action. I conclude that the notice, while hardly a model of clarity, met the requirements of s. 5(1) for the following reasons.

[29] First, the articles are replete with references to the appellants having fabricated allegations of sexual assault and levelling false accusations against the accused in the criminal proceeding. The respondents were not in a position, as was suggested by the motion judge, of having to guess about the matter complained of. The nature of the alleged libel, being that the appellants falsified complaints to the police, is of the most serious nature. There is no need to resort to innuendo; the sting of the libel is plain on the face of the articles.

[30] Second, it is significant that the respondents made only a limited objection to the notice in their statement of defence. They did not allege that the notice was invalid because it failed to specify the matter complained of. Instead, they complained that the statement of claim went "beyond the matters complained of" in the notice. Query how the notice can be both invalid for failing to specify the matter complained of and, at the same time, serve to define the limits of the matter complained of? The limited objection raised by the respondents speaks volumes about the true state of their understanding regarding the matter complained of in the notice.

[31] Third, the timing of the motion leads to a reasonable inference that this was a position that the respondents decided to try on well into the litigation and that they were not genuinely confused about the nature of the matter complained of on receipt of the notice. Notably, their intention to bring the motion was not disclosed to the pre-trial judge. Respondents' counsel's explanation that he was waiting to obtain agreed upon translations of the articles before bringing the motion strikes me as hollow.

[32] Fourth, in his opinion column, editor Young Kwon Cho acknowledged that in proclaiming the innocence of the accused, he recognized that his newspaper could be exposed to a defamation claim. It is not credible that, having averted to this possibility, the notice did not sufficiently bring home to him the matter complained of. Either the appellants were telling the truth or they were not. In reporting on the withdrawal of the charges in the manner they did, the respondents understood that they faced litigation exposure.

[33] Fifth, the respondents' primary submission in oral argument on appeal was that the articles properly construed are not defamatory of the appellants. Rather, they say that the real criticism was directed at a third party, who is alleged to have instigated and encouraged the false statements. That argument may well form the basis of a defence on the merits, but it adds little to the present analysis. The notice made clear that it was being sent on behalf of the appellants. It is difficult to fathom that the respondents would think that counsel for the appellants

was writing to give notice of a potential claim related to statements made about a third party. It would have been clear to any publisher that the appellants were complaining that the articles stated that they had fabricated their allegations.

D. DISPOSITION

[34] I would allow the appeal and set aside the order of the motion judge. The appellants, as the successful parties, are entitled to their costs of the appeal, which I would fix at $15,000, inclusive of fees, disbursements, and HST.

Released: MAY 1 8 2016

I agree Doherty J.A.

I agree Sharpe J.A.