COURT OF APPEAL FOR ONTARIO

CITATION: John v. Ballingall, 2017 ONCA 579
DATE: 20170707
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Doherty, Benotto and Trotter JJ.A.

BETWEEN

Darren John

Plaintiff (Appellant)

and

Alex Ballingall, Toronto Star Newspapers Ltd. and Torstar Corporation

Defendants (Respondents)

Maanit Zemel and Omar Ha-Redeye, for the appellant

Iris Fischer and Kaley Pulfer, for the respondents

Heard: April 24, 2017

On appeal from the order of Justice Jamie Trimble of the Superior Court of Justice, dated April 1, 2016, with reasons reported at 2016 ONSC 2245.

Benotto J.A.:

A. INTRODUCTION

[1] The appellant is a rapper who performs under the name of Avalanche the Architect. He sued the respondents for libel as a result of an online article written about him. The article was published on the Toronto Star's website on December 4, 2013 and in the print edition on December 9, 2013.

[2] The appellant's claim was struck on a motion under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, because he did not comply with the six-week notice period and the three-month limitation period provided for in ss. 5(1) and 6 of the *Libel and Slander Act*, R.R.O. 1990, c. L.12 ("*LSA*" or the "Act").

[3] He appeals on the basis that the *LSA* does not apply to online articles. He submits the applicable limitation period is two years under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24.

B. FACTS

[4] Sometime prior to December 2013, the appellant wrote a rap titled "Got Yourself a Gun". As a result of the lyrics to that rap, the appellant was charged with uttering threats to cause death or bodily harm and criminal harassment.

[5] The respondent, Alex Ballingall, is a reporter who works for the respondents, the Toronto Star Newspapers Ltd. ("the Star") and its parent company Torstar Corporation.

[6] Ballingall sought to interview the appellant about the criminal charges. The appellant obtained legal advice and agreed to be interviewed and photographed. Ballingall's article was published in the online version of the Star's newspaper on December 4, 2013. The title to the article was "Rapper says death threat just a lyric". The content of the article described the criminal proceedings.

[7] The following day, the appellant sent the Star an electronic "factual error" message through the Star's website complaining about the article. In the message, he said, in part:

> The title says I said death threat was just a lyric in the rap this is not true I did not admit to making death threat in my rap and in fact I at no point say I am going to commit any type of violence.

[8] On December 9, 2013, the Star published the same article in its print newspaper, but with the headline "Trial to decide if rapper's rhyme is a crime".

[9] There was no further communication between the parties until sixteen months later, on April 15, 2015, when the appellant sent an email to Ballingall complaining about the online version of the article, alleging libel, and threatening legal action. He said, in part:

> All of these lines are not my words inaccurate and misleading as well as libelous so I ask that you please remove them and issue a retraction as the crown has used your story as a reference point as being my sediments (*sic*) and these claims of poetic license are not only not my words it is and never was my defence.

[10] The appellant then issued a statement of claim on April 28, 2015, alleging the words "Rapper says death threat just a lyric" in the online version of the article are false, defamatory, and libellous. The statement of claim states: "The significance of the title is that it suggests that the [appellant] thinks that he can make a death threat as long as it is in a song which [the appellant] knows is not a

defence under the charter". The scope of the appellant's action was limited to allegations about the online version of the article.

C. MOTION TO STRIKE

[11] The respondents brought a motion pursuant to r. 21.01(1)(a) requesting the action be struck on a point of law because it was statute-barred by ss. 5(1) and 6 of the *LSA*.

[12] The motion concerned one issue: whether the *LSA* applies to the newspaper's electronic edition. The appellant did not contest the respondents' submission that if the *LSA* applied, then failing to meet the notice requirement – both in content and regarding the timing of the notice – was fatal to the cause of action.

[13] The motion judge concluded the notice and limitation periods in the *LSA* apply to the Star's online version. He further found the appellant's message of December 5, 2013 did not meet the standard required of notice under s. 5(1) of the Act because there was no direct or implied assertion that the statements in the article were libellous or that the appellant contemplated legal action. Although the content of the email sent on April 15, 2015 satisfied the notice requirements, it was sent long past the six-week notice period imposed by the *LSA*. Similarly, the statement of claim was filed long past the three-month time limit set out in the Act.

[14] The motion judge dismissed the claim.

D. ISSUES ON APPEAL

[15] As described below, the appellant sought to significantly expand the issues on appeal beyond the issue before the motion judge. The issues properly before this court on appeal are:

1. Does the *LSA* apply to the online article?
2. Was the *LSA* complied with?
3. Did the motion judge err in applying r. 21.01(1)(a) to strike the action?

E. RELEVANT PROVISIONS OF THE *LSA*

[16] Section 5(1) of the *LSA* provides the notice requirement for an action in libel in a newspaper:

> 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. [Emphasis added.]

[17] Section 6 provides the limitation period for an action:

> An action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action. [Emphasis added.]

[18] Section 1(1) defines "newspaper" as follows:

> "newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year.

F. ANALYSIS

[19] The appellant submits the motion judge erred in dismissing the claim. In support of his position he seeks to expand the issues on appeal to include matters not raised before the motion judge, including: (i) the application of the *LSA* to the Internet generally; (ii) the application of the *LSA* to various types of online postings; and (iii) whether an Internet posting is a "broadcast" under the *LSA*.

[20] The only issue for this court to decide is the correctness of the motion judge's decision on the facts of this case. This case did not involve the Internet or online postings generally, nor was it about a "broadcast". The issue was whether the online version of a newspaper is – for the purposes of the *LSA* – a newspaper.

(1) Does the Act apply to the online article?

[21] The appellant submits the online version of the article is not published "in a newspaper" because there is no paper. He argues that because it is not printed on physical paper, it is excluded from the *LSA*. Further, he submits the legislature clearly intended not to include online versions of a newspaper because there has been no amendment to the *LSA* to cover this point.

[22] I do not agree. In *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526 (C.A.), this court considered the issue and concluded that a newspaper does not cease to be a newspaper when it is published online. In *Weiss*, an action was commenced against a writer without complying with s. 5(1) of the *LSA*. Lax J. dismissed the claim on the basis that notice had not been given. This court upheld the motion judge and addressed the same issue as is being considered here. At paras. 24 and 25, Armstrong J.A. said:

> The Act defines a newspaper in part as a "paper" containing certain categories of information for distribution to the public. I think the word "paper" is broad enough to encompass a newspaper which is published on the internet.
>
> If I am wrong in my conclusion and the word "paper" is to be given a more restrictive meaning i.e. the substance upon which a newspaper is ordinarily printed, then arguably s. 5(1) is not available to the defendant. However, such a result would clearly be absurd. It would mean that if an action was commenced against a newspaper, without serving a s. 5(1) notice, it would be barred in relation to the newsprint publication but not so barred in relation to the online publication, unless of course it fell within the definition of "broadcast". The ordinary meaning rule of statutory interpretation articulated by Ruth Sullivan, in *Driedger on the Construction of Statutes*, is helpful:
>
> > (1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
> >
> > (2) Even where the ordinary meaning of a legislative text appears to be clear, the

> courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.
>
> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible, that is, it must be one of the words are reasonably capable of bearing.
>
> In my view, the purpose and scheme of the notice provision in the *Libel and Slander Act* are to extend its benefits to those who are sued in respect of a libel in a newspaper irrespective of the method or technique of publication. To use the words of Justice Lax, "a newspaper is no less a newspaper because it appears in an online version." [Citations omitted.]

[23] I agree with the analysis in *Weiss* that the word "paper" in the definition of "newspaper" is not restricted to physical paper. To hold otherwise would be to ignore principles of statutory interpretation, which are flexible enough to achieve the intent of the legislature in the context of evolving realities. As the Supreme Court of Canada held in *R v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 38:

> The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted. Preserving the original

> intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. [Citations omitted.]

[24] The courts have interpreted legislation to apply to advances in technology that did not exist when the provision was enacted. For example, courts have found the *Telegraph Act*[1] applies to telephones, and a fibre optic system is a "cable" within the meaning of the *Income Tax Act*[2], despite the fact that neither of these technologies existed at the time the relevant provisions were enacted: see *Attorney General v. Edison Telephone Co. of London Ltd.* (1880), 6 QBD 244; and *British Columbia Telephone Co. v Canada* (1992), 139 N.R. 211 (F.C.A.).

[25] The regime in the *LSA* provides timely opportunity for the publisher to address alleged libellous statements with an appropriate response that could be a correction, retraction, or apology. Now that newspapers are published and read online, it would be absurd to provide different regimes for print and online versions.

[26] The appellant submits that *Weiss* was overturned – or at least questioned – by this court in *Shtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405, 306 O.A.C. 155. In that case, *Shtaif* brought several claims against Toronto Life magazine arising from an online article. Initially, there was no claim on the basis of the print version. *Shtaif* also sued in negligence and, unlike here, alleged the

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[1] 1868, c. 110.
[2] S.C. 1970-71-72, c. 63.

publication was not broadcast from a station in Ontario and therefore was outside the scope of the *LSA*. The motion judge ruled the online version of the article was not subject to ss. 5 and 6 of the *LSA* because a website posting is not a newspaper. He also held the article was not broadcast in Ontario. Both sides appealed.

[27] This court determined the appropriate course was to have this issue determined by a trial. At paras 24-26, Laskin J. A. said:

> I think the sensible course is ... to leave to trial the question whether the internet version of the article is a newspaper published in Ontario or a broadcast from a station in Ontario. I am not satisfied that the evidentiary record before us is sufficient to decide these questions, which have broad implications for the law of defamation.
>
> Leaving these questions for trial also makes practical sense. On my proposed disposition of these appeals, the issue whether the claim for libel in the internet version of the article is subject to the notice and limitation provisions of the Act is relevant only to the issue of discoverability, an issue I would also leave to be determined at trial.
>
> Therefore, I would hold that the issue whether the claim for libel in the internet version of the article is subject to ss. 5(1) and 6 of the Act is a genuine issue requiring a trial.

[28] The decision in *Shtaif* arises out of facts distinguishable from those here.

[29] First, in *Shtaif*, unlike here, one of the primary issues was discoverability about which there was conflicting evidence. Second, the issue of broadcast location was in issue as the Toronto Life server was in Texas. This was a reason the court elected to follow the case of *Bahlieda v. Santa* (2003), 68 O.R. (3d) 115

(C.A.), which involved conflicting evidence on the issue of broadcast. In fact, *Bahlieda* was not a newspaper case, but rather involved a website. In the present case, the issue of broadcast was not raised before the motion judge. Third, Toronto Life moved against *Shtaif* for summary judgment, pre-*Hyrniak*[3], on the basis the limitation period had passed. The motion was not for a ruling on a point of law pursuant to r. 21, as is the case here.

[30] I also do not accept the appellant's submission that *Shtaif* called into question the *ratio* of *Weiss*. On the contrary, Laskin J.A. affirmed the need for "judicial interpretation" to deal with new technology. At para. 20, he referred to the *LSA* and commented:

> The Act was drafted to address alleged defamation in traditional print media and in radio and television broadcasting. It did not contemplate this era of emerging technology, especially the widespread use of the internet. The application of the Act to internet publications will have to come about by legislative amendment or through judicial interpretation of statutory language drafted in a far earlier era. [Emphasis added.]

[31] That the court in *Shtaif* chose to send the matter to trial in the context of conflicting evidence on discoverability and the issue of broadcast does not call into question the decision in *Weiss*, which remains binding on this court.

[32] I conclude the *LSA* applies to the online version of the article.

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[3] *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, which significantly reformed the approach to motions for summary judgment.

(2) Since the Act applies, was the action statute-barred?

[33] The statutory notice requirement in the *LSA* provides media defendants with the timely opportunity to consider whether any retraction or apology is necessary and thereby mitigate any damages: see *Grossman v. CFTO-TV Ltd.* (1982), 39 O.R. (2d) 498 (C.A.), at p. 501, leave to appeal refused, [1983] S.C.C.A. No. 463.

[34] The appellant submits the notice and limitation periods do not start to run until the article is no longer on the Internet. He suggests, for every day the defamatory words are published online, a new and distinct cause of action accrues and a new limitation period begins to run. The defamatory words were removed on April 29, 2015. Therefore, the last cause of action began to run on April 28, 2015. Based on the motion judge's findings, the notice under the Act was delivered on April 15, 2015, which is 13 days before the last cause of action accrued. Thus, the appellant submits the notice was delivered within the six-week notice period under s. 5(1) of the Act. Further, the statement of claim was issued on April 28, 2015, which is the same day the last limitation period began to run. Therefore, the claim was issued within the three-month limitation period imposed by s. 6 of the Act and was not statute-barred.

[35] I do not accept this submission. The appellant seeks to rely on an incorrect interpretation of the "multiple publication rule". That concept provides that when an alleged libel is republished across different mediums, including the Internet, those

republications are treated as distinct libels. In *Shtaif*, the court rejected the notion that the limitation period for a suit about an online magazine article starts to run when the plaintiff becomes aware of the printed version. This was the basis for the conflicting evidence on discoverability in *Shtaif.* This decision does not mean that each day of online publication grounds a new cause of action. The court in *Vachon v. Canada Revenue Agency*, 2015 ONSC 6096, expressly rejected this interpretation of *Shtaif.* I concur with Hackland J., who said, at para. 22:

> The plaintiff argues that the alleged defamation should be taken as having been republished every day [while it] remained accessible on the internet ... *Shtaif* does not support that proposition ... any limitation period based on discoverability will run from the point where the internet defamation is discovered.

[36] The time by which the plaintiff must give notice under s. 5(1) and bring his action under s. 6 begins to run when the libel has come to the knowledge of the person defamed. There is no dispute here that, on December 5, 2013, when the appellant submitted the "factual error" message, he was aware of the facts on which his cause of action might be founded. He was aware of the statements, took exception to them as inaccurate, and demanded a correction. The clock began to run on December 5, 2013, when the appellant knew that statements were made that might be considered libellous.

[37] The notice under s. 5(1) of the Act must identify the offending remarks to sufficiently enable the defendant to know which they are, to investigate, and amend

or issue an apology or otherwise mitigate damages. The appellant's message of December 5, 2013 did not meet the standard required of notice under s. 5(1). The message was a statement of factual errors in the article and there was no direct or implied assertion that they were libellous.

[38] In addition to the appellant's failure to comply with the six-week notice period, the three-month limitation period similarly expired long before the appellant issued his statement of claim, sixteen months later.

(3) Does r. 21 apply to dismiss the claim?

[39] The respondent's motion was decided on the basis of r. 21.01(1)(a), which provides:

> 21.01 (1) A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

[40] The appellant submits the motion judge incorrectly admitted evidence on the r. 21 motion. I do not accept this submission. It was the appellant who sought to file an unsworn affidavit. The respondents did not object and the judge granted him leave, but gave the evidence no weight. The only documents the motion judge referred to were those the appellant cited in his statement of claim: see *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), leave to appeal refused, [1999] S.C.C.A. No. 460.

[41] The appellant submits there were necessary findings of fact to be made before the action could be dismissed. The record does not support this assertion. The appellant acknowledged he sent the December 2013 message. There is therefore no issue as to when time began to run for the purposes of the notice and limitation periods. Since I have concluded the *LSA* applies to the online newspaper article and the claim was not started in time, it is plain and obvious the action cannot succeed.

G. DISPOSITION

[42] I would dismiss the appeal and request that the parties file brief written submissions (no more than seven pages) on costs within 15 days of the release of these reasons.

M. L. Benotto J.A.

I agree A. Hoy A.

I agree K. J. Horkins J.A.

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