CITATION: John v. Ballingall et al., 2016 ONSC 2245
COURT FILE NO.: CV-15-2007-00
DATE: 2016 04 01

2016 ONSC 2245 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Darren John, Plaintiff

AND:

Alex Ballingall, and the Toronto Star, Defendants

BEFORE: Trimble J.

COUNSEL: Self-Represented, Plaintiff
K. Pulfer, Counsel for the Defendants

ENDORSEMENT

Background:

[1] Mr. John, the Plaintiff, is a rapper who performs under the name of Avalanche the Architect. He sues Mr. Ballingall, a reporter, and the Toronto Star and its parent corporation, by Statement of Claim issued April 25, 2015, or libel because of an article Mr. Ballingall wrote about Mr. John which was published on the Toronto Star website on December 4, 2013, and in the hard copy print edition on December 9.

[2] The Defendants bring this motion for a determination on a point of law under Rule 21.01(1)(a), namely whether Mr. John's action is barred by his failure to meet the notice requirements of s. 5 (1) of the *Libel and Slander Act*, RSO 1990, c. L12, and irrespective of the notice issue, whether Mr. John issued his Statement of Claim within the 3 month limitation under s. 6 of the Act.

[3] The Defendants say that Mr. John's action is statute barred for the following reasons:

a) The failure to give the Defendants notice of the liable, which complies with the notice requirements as set out in s. 5(1) and the jurisprudence that has considered the issue of notice, is fatal to a claim. The email that Mr. John sent to the Defendants on December 5, 2013 (the day after the e-publication of the story) did not comply with the notice requirements and therefore, Mr. John failed to provide notice within six weeks of becoming aware of the alleged libel.

b) Emails he sent in April, 2015 were closer to meeting the notice requirement (although they did not do so). Assuming that they meet the content requirements of notice under s. 5(1), they were not given within the 6 week notice period required by the statutes. Therefore, there is no notice as required by the statute.

c) If the December, 2013 email is considered notice, the Statement of Claim was not commenced within three months after the libel came to the knowledge of the claimant.

[4] The parties agree that in order to obtain relief under R. 21.01(1)(a), it must be "plain and obvious" that the claim cannot succeed.

[5] Mr. John says that the *Libel and Slander Act* does not apply to electronically posted information, only to hard copy newspapers. Therefore, there is no notice requirement, and the limitation is the two year limitation under s. 4 of the *Limitations Act*.

Issues:

[6] The following issues arise in this case:

a) Does the *Libel and Slander Act* apply to a newspaper's electronic edition?

b) Did Mr. John give notice as required by s. 5(1) of the Act?
   a. When did "the libel … come to the knowledge of the person defamed…?"
   b. What must the Notice contain?
   c. Did any of Mr. John's emails meet the Notice requirements?

c) Was the Statement of Claim issued within time?

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Decision:

[7] Mr. John's action is statute barred and must be dismissed. He failed to give proper notice under section 5(1) of the *Libel and Slander Act*. In any event, he first became aware of the alleged libel the day it was published electronically or the day after. The Statement of Claim was issued 16 ½ months later, 13 ½ after the expiry of the limitation in section 6 of the Act.

Analysis:

[8] There was a preliminary evidentiary question. Mr. John provided to me at the beginning of the hearing a factum and affidavit. The affidavit was not sworn, but the parties agreed that I could treat it as it were sworn. The affidavit contained argument, and the factum contained evidence and exhibits.

[9] The Defendants did not object to me receiving the "exhibits" attached to the factum as those exhibits comprised the article published on The Star's web site and some email correspondence. The Defendants did object to my admitting under Rule 20.01(2)(a) the affidavit or evidence contained in the factum. I exercised my discretion to admit their contents into evidence, subject to weight. Having reviewed their contents in the context of the whole file, I give the factum and affidavit no weight. The information contained in Mr. John's factum and affidavit addresses the merits of the action, not the issues of notice and limitation raised on this motion. The exception to this is paragraph 9 of the affidavit in which Mr. John argues that *Schtaif v. Toronto Life Publishing Co*., 2013 ONCA 405 stands for the proposition that the *Libel and Slander Act* does not apply to electronic publishing on a website.

[10] I now turn to the analysis of the issues.

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a) Does the Libel and Slander Act apply to a newspaper's electronic edition?

[11] Mr. John says that *Schtaif* says that the *Libel and Slander A*ct does not apply to electronic publication, and therefore, the 2 year limitation under s. 4 of the *Limitations Act* applies. I disagree with Mr. John's characterization of the result in *Schtaif*.

[12] In *Schtaif*, Toronto Life published an article in the June, 2008 edition of the magazine, which in August, 2008, it posted on the website. The Plaintiffs issued a Statement of Claim, claiming that the Defendants had defamed them in the electronic version of the article. The Defendant's moved for summary judgment (not for a ruling on a point of law) that the limitation had passed. The Plaintiffs moved to amend the Statement of claim to add an allegation of defamation arising from the hard copy version of the article and argued that they could "recapture" that claim under s. 6 of the Act. The motion judge allowed the amendment to the Statement of Claim, then dismissed the action as it pertained to the printed article. The motion judge ruled that the *Libel and Slander Act* did not apply to the internet version of the article was not subject to the *Libel and Slander Act*.

[13] One of the issues that was to be decided was whether the claim for libel arising from the internet publication was covered by the Act. The Court of Appeal held that this issue required a trial. In context, however, a central issue in Schtaif was the issues of discoverability, about which there was conflicting evidence. In paragraph 25 of the decision, the Court of Appeal said "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 leave to be determined at trial."

[14] In coming to this decision, the Court of Appeal reviewed two other decision of its own court: *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526 and *Bahlieda v. Santa* (2003) 68

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O.R. (3d) 115. It preferred the reasoning in *Bahlieda*, another case involving conflicting evidence. *Bahlieda* was also a Summary Judgment case (like *Schtaif*). The Court of Appeal in *Bahlieda* commented that a Summary Judgment motion is not a replacement for a trial and will not be suitable in deciding issues of conflicting evidence. I also note that both cases were decided before the changed summary judgment rule and *Hryniak*.

[15] There are significant differences between *Schtaif* and this case which make it distinguishable. It was a summary judgment motion, and discoverability was in issue. It was brought under the unamended summary judgment rule and was pre *Hryniak*. Mr. John's case has no issue as to discoverability that required a trial.

[16] In my view, the weight of jurisprudence favours the view that an internet posting or broadcast is covered by the *Libel and Slander Act*, unless specific facts dictate otherwise.

[17] In *Weiss v. Sawyer*, 2002 CarswellOnt 3003, Weiss wrote a book review of Sawyer's book, to which Sawyer took offense. He wrote a letter to the publisher of Weiss' book review and emailed it to him. He also faxed the letter to other newspapers and periodicals that he thought had some connection to Weiss. The book review's publisher, published Sawyer's letter in its hard copy and on its website. Weiss said the letter was libellous. Lax, J. heard a motion for summary judgement. Her Honour declared that a newspaper was no less a newspaper because it appeared in an on line version and therefore, *the Libel and Slander Act* applied. She dismissed the action for failure to give notice under s. 5(1). The main issue on appeal was whether an internet website posting of a newspaper is covered by the Act.

[18] In *Weiss*, the arguments were as they were before me. *Weiss* (like the Defendants before me) argued that a newspaper is a newspaper and entitled to the protection of the *Libel and Slander Act*, regardless of whether it publishes in hard copy or in hard copy and e-copy. Sawyer (like Mr. John before me) argued that it did not apply to e-publication.

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Armstrong, J.A. wrote that the words "newspaper" and "paper" as defined in the *Libel and Slander Act* are broad enough to cover a newspaper which publishes on the internet. To hold otherwise would create absurd result where the hard copy would have protection of the Act, but the e-copy would not (see para.s 24 & 25). I agree with Lax, J. and Armstrong, J.A..

[19] The Court of Appeal in *Schtaif*, reviewed *Weiss*. It did not reverse or disapprove of *Weiss*, but because of factual similarities, applied in *Schtaif* its earlier decision in *Bahlieda*.

[20] Other cases, without delving into the question of whether the *Libel and Slander Act* applies to an internet posting or broadcast, have accepted, implicitly, the statute does apply to an internet publication or broadcast (see *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2005 CarswellOnt 2265 (C.A.) involving an internet re-broadcast of a radio interview; *CUPW v. Quebecor Media Inc.* , 2016 ONCA 1331 involving a Toronto Sun internet broadcast, web blog posting and paper edition; and *World Sikh Organization of Canada v. CBC*, 2007 CarswellOnt 7649 (SCJ) involving a television broadcast, radio broadcast, internet broadcast and internet article).

b) Did Mr. John give notice as required by s. 5(1) of the Act?

a. When did "the libel … come to the knowledge of the person defamed…?"

[21] Mr. John did not contest the Defendants' submission that failing to meet the notice requirement (both in content and timing of the notice) was fatal to a cause of action, if the *Libel and Slander Act* applied.

[22] 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". In other words, discoverability applies and the plaintiff need not have actual

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knowledge. The time begins to run when he reasonably could have known of the libel. Of what must he have, or ought to have knowledge: the cause of action or the facts on which the cause of action is based? It is the latter. For all of these propositions, see *Bhadduria v. Persaud*, (1998), 40 O.R. (3d) 140 Gen. Div.) at para. 22 and 26; and *Macdonald v. CBC*, 2011 ONCA 62, para. 1.

[23] On December 5, 2013, the day after the e-publication of the article, Mr. John wrote to the Defendants. Mr. John, like e.e. cummings, did not use capitals or punctuation. I have edited the email only to insert punctuation and capitals where appropriate:

> Article: Rapper Says Death Threat Just a Lyric
> Issue: Factual Error
> Name: Darren John
> …
> 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. Second, the song was only directed to Scotia Sparxx, and I did not ever say it was directed at 2 people. My argument in court is that it was directed to one person and because I mention someone else's name in passing does not make it about them. So, I was improperly quoted there as well, and finally there is no legal argument of poetic license nor did I say that I was arguing that. My argument which I made clear is that I did not make a threat, period, and if one was construed from my lyrics, it could only be taken that way by Scotia Sparxx as I mentioned his name and make reference to his pimp persona over 20 times in the song and Sonia's name 9b times in the span of 4 bars. My only other complaint is that there was not enough emphasis put on the fact this rap game is my job and I get paid for battling and writing the type of rape I do and this was not any different that what all my music is like, and that AVELANCHE THE ARCITECT is not Darren John. And I would like to note that Sonia does not have a charity license aned she stole the ideal of a charity project from her ex girl-friend, Benzosa, which is why they broke up, and she is in fact on government assistance and got kicked out of her apartment she was living in with a guy named Alvin, also named in my song.

[24] In this case, from the December 2013 email Mr. John sent to the Defendants, 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.

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[25] Mr. John said that he did not now that he suffered any damage as a result of these statements until 2015 when a) he lost concert bookings because of them, and b) when the Crown, in the criminal trial arising from the alleged death threats made in one of his raps, referred to the uncorrected Toronto Star article. It was only then that he knew he had a problem, and then when the limitation ought to have begun to run.

[26] Mr. John's argument is akin to that made in tort claims where the limitation does not begin to run until the tort is completed, and the tort is not complete until there is negligence and damage (see *A.C.A. Cooperative Association Ltd. v. Associated Freezers of Canada Inc.*, 1990 CanLII 4218 (NS SC), appeal dismissed 1992 CanLII 2452 (NS CA).

[27] This argument is misguided for several reasons. First, the limitation clock begins to run when Mr. John knew that statements were made that might be considered libellous. It is knowledge of the facts that give rise to the cause of action that start it running, not the realization that one has a cause of action. Second, in defamation cases, the very foundation of the tort is that the very publication of a libel or making the slander causes damage to the victim's reputation.

b. <u>What must the Notice contain?</u>

[28] Section 5(1) does not prescribe the form of notice. It says that the Plaintiff must deliver notice "… specifying the matter complained of …".

[29] What a notice must contain depends on the facts. The notice must identify the offending remarks sufficiently to enable the Defendant to know which they are, to investigate, and amend or issue an apology or otherwise mitigate damages (see *Gutowski v. Clayton,* 2014 ONCA 921 (C.A.), para. 36). It must identify the Plaintiff and fairly bring home to the defendants the matter complained of (*Grossman v. CFTO-TV Ltd* (1982), 39 O.R. (2d) 498 (C.A.) p. 504-505).

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[30] The Court of Appeal has said " …[A] defendant is entitled to know with clarity the essence of the case it has to meet and have the opportunity to meet it before an action for libel is commenced. The denial of sufficient particularity constitutes a denial of that opportunity. The issue in every case, therefore, is whether the written notice provides enough clear information for an appropriate response too be considered and taken." (see *Siddiqui v. CBC,* 2000 CarswellOnt 3517 (C.A., para 18). Siddiqui said that where there are several hundred words in the article complained of, the defendant is entitled to know which of them are alleged to be libellous. The notice must not also state the alleged offending statements, but be such that the defendants ought reasonably to infer that legal actions was being contemplated against them (see *St. Elizabeth Home Society v. Hamilton (City*), 2005 CarswellOnt 7298 (S.C.J.) para. 136.)

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c. Did any of Mr. John's emails meet the Notice requirements?

[31] Mr. John's email of December 5, 2013 did not meet the standard required of notice under section 5(1). By its title, the email was a statement of factual errors in the article. Its content addressed only factual errors. Mr. John wanted them corrected. There was, however, no direct or implied assertion that the statements were libellous, or that Mr. John contemplated legal action. Since that notice was defective, it did not meet the content requirement of section 5(1), and fails for that reason.

[32] Mr. John's email of April 15, 2015 meets the content requirements of notice under section 5(1). It identifies two specific statements and complains that they are libellous. It demands a retraction and threatens legal action. It fails to meet the requirement under 5(1) that the notice must be sent within three weeks of Mr. John`s becoming aware of the defamation. As indicated above, he became aware of the facts on which he could have based his libel claim by the time he wrote his December 5, 2013 email. Therefore, the limitation expired on or about December 31, 2013 depending on how holidays and weekends fell on the calendar. This email, however, was sent 16 months after the article was published

c) Was the Statement of Claim issued within time?

[33] Based on my findings, above, it is clear that the Statement of Claim was not filed within the 3 month limitation in section 6 of the Act.

[34] Based on the foregoing, it is plain and obvious, on the basis of the pleadings and the documents referred to in those pleadings, that this matter cannot succeed. All parties agree that all claims advanced in the Statement of Claim are in libel. Therefore, the action is dismissed.

Costs:

[35] If the parties cannot agree as to costs, I will accept costs submissions, in writing, not to exceed 3 pages (excluding cases and bills of costs). Mr. John is to have his submissions filed by April 15, 2016, and the Defendants by April 22, 2016.

Trimble J.

Date: April 1, 2016

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COSTS ENDORSEMENT

Trimble J.

Released: April 1, 2016