COURT OF APPEAL FOR ONTARIO

CITATION: Shtaif v. Toronto Life Publishing Co. Ltd., 2013 ONCA 405
DATE: 20130617
DOCKET: C54722

2013 ONCA 405 (CanLII)

Laskin, Juriansz and Tulloch JJ.A.

BETWEEN

Michael Shtaif and Gregory Roberts

Plaintiffs (Appellants)

and

Toronto Life Publishing Co. Ltd., Sarah Fulford, Jay Teitel, Veronica Maddocks, Angie Gardos, Matthew Fox and Claire Cooper

Defendants (Respondents)

Michael Shtaif, acting in person

Gregory Roberts, acting in person

Howard W. Winkler, for the respondents

Heard: October 29, 2012

On appeal from the order of Justice P. Theodore Matlow of the Superior Court of Justice, dated November 21, 2011, with reasons reported at 2011 ONSC 6732.

Laskin J.A:

A. INTRODUCTION

[1] Toronto Life published an article in the June 2008 edition of its magazine titled "How to Piss Off a Billionaire". It later posted the article on its website, which could be accessed over the internet. The article was a profile on Canadian

businessman Alex Shnaider. Part of the article referred to a business dispute between Shnaider and the plaintiffs, Michael Shtaif and Gregory Roberts. The plaintiffs claim that the article libelled them.

2013 ONCA 405 (CanLII)

[2] Shtaif and Roberts complained about the print version of the article but did not sue over it. However, when they became aware of the internet version of the article in late August 2008, they gave notice under the *Libel and Slander Act* and in October 2008, brought this action. They sued Toronto Life and several individuals who worked for it, including Jay Teitel who wrote the article. They claimed damages both for defamation and negligence.

[3] In June 2011, Toronto Life brought a motion for summary judgment to dismiss the action on the grounds that the defamation claim was barred by the limitation period in the Act and the negligence claim was bound to fail because the defendants owed no duty of care to the plaintiffs. Shtaif and Roberts brought a cross-motion to amend their statement of claim to add a claim for libel in the print version of the article. They contended that they could “recapture” this claim under s. 6 of the Act. The motion judge granted the plaintiffs’ motion to amend and then dismissed the claim for libel in the print version of the article. Otherwise, he dismissed Toronto Life’s motion for summary judgment.

[4] Both the plaintiffs, Shtaif and Roberts, and Toronto Life, with leave, appeal from the motion judge's decision. Their appeals raise numerous issues, which I list and would answer as follows:

(a) The claim for libel in the internet version of the article:

(1) Is this claim subject to the notice and limitation provisions in the *Libel and Slander Act*?

Answer: This issue is a genuine issue requiring a trial.

(2) Should this court apply the American "single publication rule" to bar this claim?

Answer: No.

(3) Is the issue of discoverability properly before this court, and if so, is the claim barred because it was discoverable more than three months before the plaintiffs sued?

Answer: Discoverability is not properly before this court and is a genuine issue requiring a trial.

(b) The claim for libel in the print version of the article.

(1) Did the plaintiffs give Toronto Life timely and adequate notice of this claim?

Answer: Yes.

(2) Does the three-month limitation period in s. 6 of the *Libel and Slander Act* bar this claim?

Answer: Yes.

2013 ONCA 405 (CanLII)

(3) Alternatively, does the two-year limitation period in s. 4 of the *Limitations Act, 2002* bar this claim?

Answer: Section 4 of the *Limitations Act, 2002* does not apply.

(c) The claim for negligence

(1) Did the motion judge err in holding that whether the defendants owed the plaintiffs a duty of care was a genuine issue requiring a trial?

Answer: Yes. The negligence claim should be dismissed.

2013 ONCA 405 (CanLII)

B. BACKGROUND

(a) The Parties

[5] Shtaif is an accountant and a businessman. Roberts is a lawyer and a businessman. Toronto Life is a well-known local magazine. The individual defendants were either employed by or were retained by Toronto Life. Teitel is a journalist and wrote the article. Maddocks checked the facts in the article for accuracy. Fulford is the editor of the magazine, and Gardos is the executive editor.

2013 ONCA 405 (CanLII)

(b) The Article

[6] The article was published in the June 2008 edition of the magazine but was in the newsstands the second or third week of May. Toronto Life posted the article on its website on May 29, 2008.[1]

[7] The parties dispute when the article – especially the allegedly offending portion – could be accessed on the internet. That dispute bears on the issue of discoverability, which I will discuss later in these reasons.

[8] The article chronicles the life of Alex Shnaider. The part of the article that implicates Shtaif and Roberts and prompted the article's title, "How to Piss Off a Billionaire", concerns a business deal in Russia that turned sour. Excerpts from the article that Shtaif and Roberts complain about include:

> - At first things went well, but in the summer of 2006, during a strangely bungled bank transaction in Moscow that could have been plucked from the pages of a John le Carré novel, $12 million in bonds that Shnaider had deposited with Shtaif in order to buy a small Siberian oil company called Sibintek somehow ended up, before the closing of the transaction, in the sole control of the seller, Arthur Poltoranin – a man who reportedly had spent five years in a Russian jail for murdering two business associates. Suspecting that Poltoranin was trying to defraud him, and that Shtaif had at the least been

---

[1] The internet version of the article is identical to the print version but for certain "pull quotes" and a sidebar unrelated to the plaintiffs.

> negligent as CEO, Shnaider put his personal network of Russian contacts into action …
>
> - In response, Shnaider accused Shtaif and Roberts of being extortionists and, possibly, conspirators in an elaborate fraud. This past March, he formalized the claims by countersuing Shtaif, Roberts and their colleagues for a total of $217 million.
> - "The real problem," says a harried-sounding Ron Fine, "is that anybody with $180 and an axe to grind can go to the media with a statement of claim and assassinate anybody's reputation…"
> - The issue for Shnaider clearly isn't finance, but face… "I can't really compare this situation to anything else I've encountered," he says. "I've been lied to and cheated in the past – it's unavoidable in business – but the difference here is that these people also attempted to damage my reputation by using the media to spread lies."

2013 ONCA 405 (CanLII)

(c) The Previous Decision of this Court

[9] In 2009, the defendants brought a motion for summary judgment to dismiss Roberts' claim on the ground that the words complained of in the article were not capable of being defamatory of him. The motion judge granted the motion. However, Roberts appealed. This court allowed the appeal and set aside the summary judgment: see 2010 ONCA 82. In a brief endorsement, the panel said:

> In our view, reading this article as a whole, it is clear that the excerpts complained of are capable of being defamatory of the appellant Mr. Roberts. The article

> clearly refers to Mr. Shtaif and Mr. Roberts and the allegations of criminal conduct are against both men.

(d) Chronology

2013 ONCA 405 (CanLII)

[10] As the timeline is material for several of the issues raised on these appeals, I will set it out in chart format. The relevant events and when they occurred are as follows.

Date	Event
Mid to late May 2008	The article published in Toronto Life magazine is available on the newsstands.
May 29, 2008	The article is posted to the Toronto Life website.
June 19, 2008	Shtaif becomes aware of the magazine version of the article.
June 23, 2008	Roberts becomes aware of the magazine version of the article.
August 1, 2008	Shtaif sends a letter to Toronto Life complaining about the magazine version of the article.
August 20, 2008	Shtaif and Roberts become aware of the internet version of the article.
September 29, 2008	Shtaif and Roberts give notice under s. 5(1) of the *Libel and Slander Act* that the internet version of the article libelled them.
October 22, 2008	Shtaif and Roberts start an action on the internet version of the article.
June 2011	The defendants move for summary judgment; Shtaif and Roberts bring a cross-motion to “recapture” a claim for libel in the print version of the article.

November 21, 2011	The motion judge dismisses the defendants' motion for summary judgment and the plaintiffs' claim for libel in the print version of the article.

C. RELEVANT PROVISIONS OF THE LIBEL AND SLANDER ACT

[11] The *Libel and Slander Act*, R.S.O. 1990 c. L.12 (the "Act"), governs many of the issues on these appeals. The following provisions of the Act are relevant.

[12] Section 1(1) of the Act defines "broadcasting" and "newspaper":

> "broadcasting" means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,
>
> (a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or
>
> (b) cables, wires, fibre-optic linkages or laser beams,
>
> and "broadcast" has a corresponding meaning; ("radiodiffusion ou télédiffusion", "radiodiffuser ou télédiffuser")
>
> "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.

Toronto Life magazine is a "newspaper", published in Ontario.

[13] Section 5(1) requires notice of any action for libel in a newspaper or in a broadcast:

> 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

2013 ONCA 405 (CanLII)

> 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.

2013 ONCA 405 (CanLII)

[14] Section 6 sets out a limitation period for bringing an action and also permits a previous libel to be "recaptured":

> 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.

Section 6 governs the plaintiffs' attempt to sue for libel in the print version of the article.

[15] Section 7 limits the application of ss. 5(1) and 6:

> Subsection 5(1) and section 6 apply only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.

Section 7 is relevant to whether the internet version of the article is subject to the notice and limitation provisions of the Act.

D. THE CLAIM FOR LIBEL IN THE INTERNET VERSION OF THE ARTICLE

(1) Is this claim subject to the notice and limitation provisions of the *Libel and Slander Act*?

[16] A threshold issue on these appeals is whether the notice provision in s. 5(1) and the limitation provision in s. 6 of the Act apply to the internet version of

the article. The issue is relevant to several submissions of the parties. However, as will become apparent, on my proposed resolution of these submissions, it would have limited practical importance in this litigation. The issue arises for two reasons: first, because of the way "newspaper" and "broadcast" are defined in s. 1 of the Act and second, because s. 7 of the Act limits the application of ss. 5(1) and 6 to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.

2013 ONCA 405 (CanLII)

[17] Toronto Life's submission that the claim of Shtaif and Roberts on the internet version of the article is out of time depends on that claim being subject to ss. 5(1) and 6. If it is not, then the two-year limitation period in s. 4 of the *Limitations Act, 2002*, S.O 2002 c.24 would apply. If a two-year limitation period governs the plaintiffs' claim, then unquestionably it is not out of time.

[18] Similarly, the plaintiffs' submission that they can recapture a claim for libel in the print version of the article depends on their claim for libel in the internet version of the article being governed by s. 6. If it is not, then standing on its own, the claim for libel in the print version of the article is out of time. It is a separate cause of action asserted long after the three month limitation period in s. 6 and even more than two years after the limitation period in s. 4 of the *Limitations Act, 2002*.

[19] The motion judge ruled that the internet version of the article was not subject to the notice and limitation provisions of the Act. He held that a website posting is not a "newspaper". He also held that he had no evidence Toronto Life's website was a "broadcast" as defined in the Act; moreover, as Toronto Life's server is located in Texas, its website was not broadcast from a station in Ontario.

[20] Both sides have questioned the correctness of the motion judge's ruling. The question whether or in what circumstances an internet publication is subject to ss. 5(1) and 6 of the Act is a difficult one. 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.

[21] Our court has grappled with the question in two decisions: *Weiss v. Sawyer* (2002), 61 O.R. (3d) 526 (C.A.) and *Bahlieda v. Santa*, (2003), 68 O.R. (3d) 115 (C.A.).

[22] In *Weiss*, the evidence conflicted on whether the publication – an allegedly defamatory letter – was published over the internet. Assuming that it was, Armstrong J.A. wrote, at para. 24, that he thought the word "paper" in s. 1(1) of

2013 ONCA 405 (CanLII)

the Act was broad enough to include a newspaper published on the internet. He did not discuss whether the internet publication was published in Ontario though implicitly he held that it was, as he found that the notice requirement in s. 5(1) of the Act applied. Armstrong J.A. did not decide whether the internet publication was also a "broadcast" as there was no evidence to make that determination.

[23] In *Bahlieda*, this court held that in the light of the conflicting evidence in the case, the question whether an internet publication was a broadcast from a station in Ontario was an issue for trial. The panel said, at para. 6: "Summary judgment applications are not a substitute for trial and thus will seldom prove suitable for resolving conflicts in expert testimony particularly those involving difficult, complex policy issues with broad social ramifications".

[24] In this case, I think the sensible course is that adopted in *Bahlieda*: 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.

[25] 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

2013 ONCA 405 (CanLII)

the Act is relevant only to the issue of discoverability, an issue I would also leave to be determined at trial.

2013 ONCA 405 (CanLII)

[26] 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.

(2) Should this court apply the American "single publication rule" to bar this claim?

[27] Many American States, either by judicial decision or statute, have adopted a "single publication rule" for mass publications. The rule holds that a plaintiff alleging defamation has a single cause of action, which arises at the first publication of an alleged libel, regardless of the number of copies of the publication distributed or sold. In other words, the entire edition of a newspaper, book or magazine is treated as a single publication when it is first made available to the public. Later distributions of the same edition are relevant to the assessment of damages but do not create a new cause of action or a new limitation period. See, for example, *Churchill v. State of New Jersey* (2005), 876 A. (2d) 311 (Sup. Ct. of N.J, App. Div.); *Gelbard v. Bodary* (2000) 706 N.Y.S.2d 801 (S. Ct. of N.Y., App. Div.); and *Firth v. State of New York* (2002) 98 N.Y.2d 365 (Court of Appeals of N.Y.); and *Calif. Civil Code*, 3425.1-3425.5.

[28] The single publication rule is designed to prevent repeated litigation arising from the same material. In *Churchill*, at p. 316, the court explained the policy reasons for the rule:

> The single publication rule prevents the constant tolling of the statute of limitations, effectuating express legislative policy in favour of a short statute of limitations period for defamation. It also allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits…Finally the single publication rule is more consistent with modern practices of mass production and widespread distribution of printed information than the multiple publication rule.

[29] Some American courts have extended the single publication rule to online postings, accessible on the internet. See *Firth*; *The Traditional Cat Association, Inc. v. Gilbreath* (2004), 118 Cal. App. 4th 392.

[30] Toronto Life submits that we should apply the single publication rule in Ontario and specifically to the plaintiffs' libel claim. Under a single publication rule, the plaintiffs' libel action would arise no later than June 23, 2008 by which time both Shtaif and Roberts had become aware of the alleged libel in the print version of the article. As they brought their action more than three months later – in October 2008 – they failed to meet the limitation period in s. 6 of the Act.

[31] However, the single publication rule has been rejected in England: see *Berezovsky v. Michaels*, [2000] 2 All E.R. 986 (H.L.); *Loutchansky v. Times Newspapers Ltd.*, [2002] Q.B. 783 (C.A.); in Australia: see *Dow Jones and Co.*

2013 ONCA 405 (CanLII)

Inc. v. Gutnick, [2002] H.C.A. 56, 2010 C.L.R. 575; and by the British Columbia Court of Appeal: see *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, 257 D.L.R. (4th) 133. And the motion judge refused to apply the rule in this case.

2013 ONCA 405 (CanLII)

[32] I, too, would not apply the single publication rule for three reasons. First, the rule does not fit comfortably with the words of s. 6 of the Act. The single publication rule is based on publication of an alleged libel. Successive publications are considered a single publication and the date of the first publication triggers the running of the limitation period. Under s. 6 of Ontario's Act, the date when the libel first came to the plaintiffs' knowledge, not the date of publication, triggers the running of the limitation period.

[33] Moreover, the recapture provision in s. 6 is inconsistent with a single publication rule. A simple example will illustrate the inconsistency. Take a case where the same libel is published and later republished, and the plaintiff sues for damages for the republished libel. Section 6 would allow the plaintiff to recapture the earlier libel. In effect, s. 6 recognizes two separate libels; the single publication rule recognizes only one.

[34] Second, the jurisprudence of this court has, implicitly at least, rejected the single publication rule. In *Weiss,* at para. 28, Armstrong J.A. affirmed the traditional English rule: "Every republication of a libel is a new libel."

[35] Third, even if we were to consider a single publication rule in Ontario, I would not apply it across different mediums of communication. In my opinion, it would be unfair to plaintiffs to apply the rule to publications that are intended for different groups or that may reach different audiences. Even in American states that apply the single publication rule, at least one state, California, has rejected its application for reprinting or republication in a different form: see *Kanarek v. Bugliosi* (1980), 108 Cal. App. 3d 327. Also, the *Restatement of the Law, Second: Torts* (American Law Institute, 1977) states that the single publication rule does not include separate aggregate productions on different occasions. If the publication reaches a new group, the repetition justifies a new cause of action. See s. 577A.

[36] Applying the single publication rule where, as in this case, the original publication is in print and the republication is on the internet could create a serious injustice for persons whose reputations are damaged by defamatory material. A plaintiff may not want to expend the time and resources to sue for an alleged libel in a magazine, which has a limited circulation and a limited lifespan. The plaintiff may consider the magazine's circulation insufficient to warrant a lawsuit.

[37] However, a plaintiff may well want to spend the time and money to sue if the alleged libel is on the magazine's website and accessible on the internet. Unless the article is removed from the website, its circulation is vast, its lifespan

2013 ONCA 405 (CanLII)

is unlimited, and its potential to damage a person's reputation is enormous. Yet, if a single publication rule is applied, the plaintiff's claim may be statute barred before real damage to reputation has occurred.

2013 ONCA 405 (CanLII)

[38] In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at paras. 32-34, my colleague Blair J.A. discussed the power of the internet to harm reputation. He commented that the internet's characteristics – its "ubiquity, universality, and utility"[2] – create challenges for libel actions. He noted that the internet's "mode and extent of publication" must be key considerations in internet defamation cases. He then asked, at para. 32:

> [32] ….How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrissa Barnett Lidsky discusses this conundrum in her article, "Silencing John Doe: Defamation and Discourse in Cyberspace" (2000), 49 Duke L.J. 855 at pp. 862-65:
>
> …
>
>> Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a

---

[2] This phrase was used by Kirby J. in *Dow Jones & Company Inc., supra*, at para. 78.

> different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie". The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse.

2013 ONCA 405 (CanLII)

[39] At para. 34, Blair J.A. distinguished the publication of defamatory material on the internet from publication in the traditional media by "its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility." See generally, Odelia Braun, "Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply" (2002), 32 Golden Gate U.L. Rev. 325; and Note, "The Single Publication Rule in Libel: A Fiction Misapplied," 62 Harv. L. Rev. 1041 (1949); see also David A. Potts, *Cyberlibel: Information Warfare in the 21st Century?* (Toronto: Irwin Law, 2011).

[40] I agree with my colleague's comments about the power of the internet to damage reputation. I would answer no to the question whether we should apply the single publication rule to bar this claim.

2013 ONCA 405 (CanLII)

(3) Is the issue of discoverability properly before this court, and if so, is the claim barred because it was discoverable more than three months before the plaintiffs sued?

[41] Assuming the Act applies to the internet version of the article, under s. 6 Shtaif and Roberts were required to bring their action within three months after the libel came to their knowledge. They say that it came to their knowledge on August 20, and therefore, as they started their action on October 22, 2008, they were well within the three month limitation period.

[42] However, the discoverability principle applies to limitation periods under the Act. See, for example, *Misir v. Toronto Star Newspaper Ltd.* (1997), 105 O.A.C. 270, at paras. 14-16. The three-month period in s. 6 begins to run when the person defamed knew or could have known about the libel by the exercise of reasonable diligence.

[43] The defendants rely on discoverability. They argue that the article was posted on Toronto Life's website at the end of May 2008 and that through reasonable diligence, the plaintiffs could have discovered the article more than three months before they started their action. Thus, their action is barred by the limitation period in s. 6.

[44] Shtaif and Roberts, however, say that discoverability is not properly before this court because Toronto Life did not raise it before the motion judge. They

have moved to strike the paragraph on discoverability from the defendants' notice of appeal.

[45] I am inclined to agree with the plaintiffs' position. The defendants did not plead discoverability in their statement of defence; they did not rely on it in their amended notice of motion for summary judgment; they did not argue it in their factum on the motion; and the motion judge made no reference to discoverability in his reasons.

[46] In limited circumstances, this court can entertain an issue not raised in the trial court. But to do so we must have a satisfactory record to address the issue and be persuaded that if we do consider it, the party against whom the issue is raised will not be prejudiced: see *Ross v. Ross* 1999 NSCA 162, 181 N.S.R. (2d) 22; *767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350. I expect that had the plaintiffs known discoverability was to be an issue before the motion judge, they would have filed a good deal of evidence to try to show that they could not reasonably have discovered the internet article earlier. Thus, I cannot say that the plaintiffs would not be prejudiced were we to consider the issue for the first time in this court.

[47] But even if we were to consider discoverability, the material filed before us shows that the date the article, and especially the alleged offending portion, could be accessed on the internet is disputed. The defendants say that it could

2013 ONCA 405 (CanLII)

be accessed around the time it was posted, at the end of May. The plaintiffs say that they could not access it until August. In support of their assertion, they point to Shtaif's August 1 letter, which did not refer to the internet version of the article.

2013 ONCA 405 (CanLII)

[48] This dispute can only be resolved at trial. Therefore, though I do not think that discoverability can properly be raised on this appeal, even if it could, it is a genuine issue requiring a trial.

E. THE CLAIM FOR LIBEL IN THE PRINT VERSION OF THE ARTICLE

[49] When the print version of the article was published in the June 2008 edition of the magazine, Shtaif and Roberts complained about it but did not to sue on it. Three years later in their cross-motion in June 2011, they asked for an amendment to their statement of claim to add a claim for damages for libel in the print version of the article. They sought to "recapture" this claim under s. 6 of the Act.

[50] Section 6 permits a plaintiff who did not sue in respect of a previous alleged libellous publication to recapture that libel in a properly constituted libel action. In this case, Shtaif and Roberts seek to recapture the alleged libel in the magazine article in their properly constituted action on the internet article. For ease of reference, I reproduce s. 6 of the Act:

> 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.

2013 ONCA 405 (CanLII)

[51] The motion judge allowed the amendment but then granted summary judgment dismissing the claim. He gave no reasons.

[52] Shtaif and Roberts appeal the dismissal of their claim. Toronto Life opposes the appeal on two grounds: first, the plaintiffs did not give timely and adequate notice of the alleged libel; and second, the claim is statute barred because it is a new cause of action asserted after the three month limitation period in s. 6 of the Act.

(1) Did Shtaif and Roberts give Toronto Life timely and adequate notice of their claim?

[53] The plaintiffs acknowledge that in order to recapture a previous libel under s. 6, they were required to give notice of that libel under s. 5(1). Robins J. explained this requirement in *Frisina v. Southam Press Ltd. et al* (1980), 30 O.R. (3d) 65 (H. Ct. J.), at p. 66-67:

> The fact that the plaintiff seeks to add a claim for earlier related alleged libels to an existing properly-constituted libel action cannot cure the failure to provide the required statutory notice. The amendment sets up additional causes of action based on the alleged defamatory material in the earlier publications and, just as lack of notice would preclude the assertion of such claims by way of separate writ of summons, so also it precludes their assertion by way of amendment to an existing action. In short, unless notice is given in

> accordance with s. 5(1), no claim is subsequently maintainable.

[54] The plaintiffs say that they gave notice: they rely on Shtaif's letter of August 1, 2008. Toronto Life says that the notice was neither timely nor adequate.

2013 ONCA 405 (CanLII)

(a) Timeliness

[55] Shtaif became aware of the magazine version of the article on June 19, 2008. Roberts became aware of the article on June 23, 2008. Toronto Life acknowledges that though Shtaif wrote the letter, he wrote it on behalf of both himself and Roberts. Section 5(1) requires that notice be give "within six weeks after the alleged libel has come to the plaintiff's knowledge". Therefore, the notice given on behalf of Roberts was timely – August 1 was within six weeks of June 23.

[56] Shtaif's position is not as clear. August 1 was 43 days after June 19. For this reason, Toronto Life says that the notice was out of time. However, s. 5(1) speaks of weeks, not days. Section 89(5) of the *Legislation Act, 2006*, S.O. 2006 c.21, Sch. F, stipulates that "a period of time described as beginning before or after a specified day excludes that day." Applying s. 89(5), August 1 was six weeks after June 19, the day Shtaif had knowledge of the article. Accordingly, in my opinion, the August 1, 2008 letter was timely for both plaintiffs.

(b) Adequacy

[57] Section 5(1) requires that the notice be in writing and that it specify the matter complained of. The adequacy of a notice must be assessed in the light of its purpose. The purpose of the notice provision is to give the media an opportunity to review the matter and then decide whether a correction, apology, or retraction is called for. See, for example, *Grossman v. CFTO-T.V. Ltd.* (1982), 39 O.R. (2d) 498 (C.A.), at p. 501; leave to appeal to SCC refused, [1983] S.C.C.A. No. 463.

[58] Therefore, although no particular form of notice is required, to meet its purpose, the notice must contain enough information to allow the media to review the matter and decide how to respond. A bare assertion that a publication is libellous would not amount to adequate notice.

[59] I am satisfied that Shtaif's August 1, 2008 constitutes adequate notice. It was a six page, single-spaced letter. It set out in detail what parts of the print version of the article concerned Shtaif and Roberts and why. Toronto Life, thus, had adequate notice of "the matter complained of".

[60] I would answer yes to the question did Shtaif and Roberts give Toronto Life timely and adequate notice of their claim.

2013 ONCA 405 (CanLII)

(2) Does the three-month limitation period in s. 6 of the *Libel and Slander Act* bar this claim?

2013 ONCA 405 (CanLII)

[61] Shtaif and Roberts seek to recapture under s. 6 of the Act their claim for libel in the print version of the article. Assuming that s. 6 applies to the internet version of the article, they submit that the three-month limitation period in s. 6 governs their recaptured claim. As they started their action for libel in the internet version of the article within the limitation period, they argue that their claim for libel in the print version of the article is not statute barred.

[62] Toronto Life agrees that the limitation period in s. 6 governs. However, it submits that the recaptured claim for libel in the print version of the article is out of time because the plaintiffs did not assert this claim within three months of August 20, 2008, the date they first became aware of the libel in the internet version of the article.

[63] Assuming that the claim for libel in the internet version of the article is subject to s. 6, I agree with both parties that the limitation period in s. 6 governs the recaptured claim. That is evident from ss. 19(1) and (4) of the *Limitations Act, 2002*:

> 19(1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,
>
> (a) the provision establishing it is listed in the Schedule to this Act;
>
> …

> 19(4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.

2013 ONCA 405 (CanLII)

[64] Section 2(1) of the *Limitations Act, 2002* provides that that Act applies to claims in court proceedings other than specified exempted claims. The libel claim is a claim in a court proceeding and is not an exempt claim under s. 2. Therefore, the *Limitations Act, 2002* applies to a libel claim. However, s. 6 of the *Libel and Slander Act* is listed in the schedule provided for in s. 19(1)(a). Thus, under s. 19(4), the three-month limitation period in s. 6 of the *Libel and Slander Act,* not the two-year limitation period in s. 4 of the *Limitations Act, 2002,* governs the recaptured claim.

[65] The more difficult question is how the three-month limitation period in s. 6 applies to the libel claim Shtaif and Roberts seek to recapture. For convenience, I again reproduce s. 6:

> 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.

[66] The plaintiffs' position is that the three-month limitation period in s. 6 applies only to their action on the internet libel, not to any earlier libel that might be recaptured. As their action for libel in the internet version of the article was

started on time, the only limitations in recapturing a claim are that the earlier libel must have been published in the one-year period before the action was started; and that the plaintiffs must have given notice of the earlier libel within six weeks after it came to their knowledge. These limitations are satisfied because the magazine or print version of the article was published some six months before the plaintiffs brought their action and the plaintiffs gave notice of that libel within the six week period.

2013 ONCA 405 (CanLII)

[67] I do not accept the plaintiffs' position. It is inconsistent with the wording of s. 6 and fails to recognize that a recaptured libel is nonetheless a separate cause of action: see *Frisina v. Southam*.

[68] In this case, the plaintiffs say that the libel in the internet version of the article came to their knowledge on August 20, 2008. They had three months from that date – November 20, 2008 – to commence their action. They brought their action on October 22, 2008, which was within the three-month limitation period in s. 6 of the Act. Therefore, they were entitled to include a claim for libel in the magazine version of the article, because they gave proper notice of it and because that alleged libel was published in May 2008, which was within the year before October 22, 2008.

[69] Indeed, the plaintiffs likely could have amended their claim or brought a fresh action at any time up to November 20, 2008 and included a claim for libel in

the magazine version of the article, as the magazine was published within the twelve month period preceding November 20, 2008.

2013 ONCA 405 (CanLII)

[70] What the plaintiffs were not entitled to do is what they have attempted to do: recapture a claim for libel in the magazine version of the article after November 20, 2008. A recaptured libel is a separate cause of action. It can only be asserted within the time period set out in the Act.

[71] In summary, a plaintiff who has brought a libel action against the media, may include in that action a claim for an earlier libel. However, to include or recapture that earlier libel, the plaintiff must meet three timing requirements. First, the earlier libel must have been published within the year period before the commencement of the action (s. 6). Second, proper notice must have been given within six weeks after the earlier libel claim to the plaintiff's knowledge (s. 5(1)). Third, the claim for the earlier libel must be asserted in the action and therefore within three months after the libel sued on came to the plaintiff's knowledge (s. 6).

[72] It is the third requirement that the plaintiffs failed to meet. Their claim for libel in the print version of the article could not be brought beyond the three-month limitation period provided for in s. 6. In other words, it could not be brought after November 20, 2008. As the plaintiffs did not assert this claim until June 2011, it is long out of time.

2013 ONCA 405 (CanLII)

(3) Does the two-year limitation period in s. 4 of the *Limitations Act*, 2002 bar this claim?

[73] For reasons I have already discussed, the limitation period in s. 6 of the *Libel and Slander Act* governs this claim. Section 4 of the *Limitations Act, 2002* does not apply.

F. THE CLAIM FOR NEGLIGENCE

(1) Did the motion judge err in holding that whether the defendants owed the plaintiffs a duty of care was a genuine issue requiring a trial?

[74] In their statement of claim, Shtaif and Roberts included a claim for negligence as well as for defamation. They allege that Toronto Life had an obligation to be mindful of their interests and to ensure that the article was accurate before they published it. They claim that Toronto Life breached this obligation because the author of the article, Teitel, and the fact checker, Maddocks, refused to review the documents relevant to the dispute between Shnaider and the plaintiffs or adequately investigate the facts pertaining to the dispute. The plaintiffs claim that because of the defendants' negligence, they have suffered income and business losses beyond damage to their reputations.

[75] In years past, judges resisted allowing plaintiffs to bring a negligence claim for what they viewed was in substance a defamation claim. The judges' concern was that negligence claims would subvert the balance defamation law strikes between protection of reputation and protection of freedom of expression, a

balance reflected in defamation law's special notice and limitation provisions and special defences. See, for example, *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (Gen. Div.), aff'd (1995), 25 O.R. (3d) 302 (C.A.); *Fulton v. Globe and Mail* (1997), 207 AR. 374 (Q.B).

2013 ONCA 405 (CanLII)

[76] However, in *Young v. Bella*, 2006 SCC 3, [2006] 1 S.C.R. 108, the Supreme Court said that a negligence claim can proceed alongside a defamation claim provided that the necessary elements of a cause of action in negligence have been established. McLachlin C.J. and Binnie J. who co-authored the court's reasons wrote, at para. 56:

> There is no reason in principle why negligence actions should not be allowed to proceed where (a) proximity and foreseeability have been established, and (b) the damages cover more than just harm to the plaintiff's reputation (i.e. where there are further damages arising from the defendant's negligence): see *Spring v. Guardian Assurance plc*, [1994] 3 All E.R. 129 (H.L.). In fact, all of the cases cited by the respondents as standing for the proposition that defamation had "cornered the market" on reputation damages were cases in which (unlike here) there was no pre-existing relationship between the parties that gave rise to a duty of care.

[77] Proximity and foreseeability are the elements necessary to establish a *prima facie* duty of care. In words now well-known in Canadian negligence law, a prima facie duty of care requires "a sufficiently close relationship of proximity between the parties such that, in the reasonable contemplation of the defendant,

carelessness on its part might cause damage to the plaintiff": see *Young v. Bella*, at para. 28.

2013 ONCA 405 (CanLII)

[78] The defendants, of course, acknowledge the principle in *Young v. Bella* but submit that on the facts of this case, which are undisputed, Shtaif and Roberts cannot make out a duty of care because there was no pre-existing relationship between the parties and thus, not a sufficiently close relationship of proximity. The defendants asked the motion judge to grant summary judgment dismissing the plaintiffs' negligence claim. The motion judge declined to do so. He held that whether the defendants owed the plaintiffs a duty of care raised a genuine issue for trial.

[79] The defendants renew their submission on appeal. They argue that the question whether the defendants owed the plaintiffs a duty of care can and should be resolved without a trial.

[80] I agree with the defendants' submission and would grant summary judgment dismissing the plaintiffs' negligence claim. The relevant facts are as follows:

- The plaintiffs and the defendants had no relationship that pre-dated the writing and publication of the article.
- Before publishing the article, Teitel telephoned Roberts. They had a four-hour telephone conversation in which Roberts explained at length his side of the dispute. He invited Teitel to review

various documents but Teitel never contacted Roberts again.

- Maddocks telephoned Roberts to verify some statements Roberts had made to Teitel during their interview. Maddocks declined Roberts' invitation to have a follow-up conversation.

[81] These two conversations are the only contacts between either of the plaintiffs and anyone at Toronto Life. In my view, they do not establish a sufficiently close relationship of proximity to give rise to a duty of care.

[82] In a general sense, members of the media have or should have an obligation to adequately investigate a story to be published, to ensure the accuracy of the facts about any person referred to in the story, and to obtain that person's side of the story: see *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. Teitel did contact and interview Roberts, and Maddocks contacted him to check the accuracy of some of his statements. But to say, as the plaintiffs have, that these contacts by themselves gave rise to a duty of care would mean that in virtually every case a plaintiff could proceed with a negligence claim as well as a defamation claim. The principle in *Young v. Bella* does not go that far.

[83] Indeed, the facts in *Young v. Bella* show the kind of evidentiary record required to make out a duty of care. The plaintiff was a university student. She sued the university, one of her professors, and others in negligence for making false remarks about her. The defendants argued that her action was in

2013 ONCA 405 (CanLII)

substance a claim for damages for loss of reputation, which could only be asserted in a defamation action.

2013 ONCA 405 (CanLII)

[84] The Supreme Court of Canada rejected that argument. However, to make out her claim in negligence, the plaintiff had to establish that the university and its professors owed her a duty of care. The court held, at para. 31, that the necessary proximity was grounded in the broader pre-existing relationship between the student and her university:

> In short, in the present case, proximity was not simply grounded in a misguided report to CPS, but was rooted in the broader relationship between the professors at Memorial University and their students. The appellant, even as a "distant" student, was a fee-paying member of the university community, and this fact created mutual rights and responsibilities. The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

[85] The case before us is quite different. Two telephone calls, part of journalists' ordinary diligence in writing a story, do not establish a pre-existing relationship that give rise to a duty of care. The plaintiffs' action is an action for defamation and nothing more. Even the claims for income and business losses are essentially consequential financial losses, compensable under the law of defamation.

[86] I would, therefore, allow the defendants' appeal on this issue and would grant summary judgment dismissing the plaintiffs' negligence claim. In all other respects, I would dismiss the defendants' appeal.

G. CONCLUSION

[87] I would dismiss the appeal brought by Shtaif and Roberts. Therefore, I would uphold the motion judge's dismissal of their claim for libel in the print version of the article.

[88] I would allow the defendants' appeal in respect of the plaintiffs' negligence claim. I would set aside the motion judge's order allowing that claim to go to trial and, in its place, grant summary judgment dismissing that claim. In all other respects I would dismiss the defendants' appeal. Therefore, the plaintiffs' action for libel in the internet version of the article may proceed to trial.

[89] The parties may make brief written submissions on costs within three weeks of the release of these reasons.

Released: JUN 17, 2013
"JL"

"John Laskin J.A."
"I agree R.G. Juriansz J.A."
"I agree M. Tulloch J.A."

2013 ONCA 405 (CanLII)