

CITATION: Torgerson et al. v. Nijem, 2019 ONSC 3320
COURT FILE NO.: CV-18-596434
DATE: 2019-05-30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DR. CORY STEPHEN TORGERSON and TORGERSON MEDICINE
PROFESSIONAL CORPORATION, Plaintiffs

AND:

FERIAL ASHLIE NIJEM, Defendant

BEFORE: Schabas J.

COUNSEL: Brian N. Radnoff, Counsel, for the Plaintiffs

David M. Derfel and Jessica B. Mahabir, Counsel, for the Defendant

HEARD: May 13, 2019

ENDORSEMENT

Overview

[1] This case raises the question of when the limitation period in s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, applies to defamation on the internet where the words complained of continue to be available to be downloaded and read indefinitely. The plaintiffs submit that as long as the defamatory words are available to be downloaded and read then a cause of action exists regardless of how long ago the words were posted and the plaintiff was aware of them. In my view, that proposition is untenable. When a plaintiff becomes aware of a specific posting on a website, time begins to run for the purpose of applying limitation periods. To hold otherwise, and allow plaintiffs to wait indefinitely to sue simply because the libel remains available, would render limitations defences meaningless and have serious implications for freedom of expression.

Background Facts

[2] The plaintiffs are a physician, Dr. Torgerson, and his management corporation. He provides facial cosmetic surgery. In October 2015, he performed procedures on the defendant, Ms. Nijem, to treat wrinkles. She was unhappy with the results and, on January 18 and 19, 2016, posted descriptions of her experience that were critical of Dr. Torgerson on three different websites – Yelp, Google, and Twitter. Dr. Torgerson became aware of each of those postings shortly afterwards, in January 2016. The defamatory words have remained on the websites continuously since being posted. However, Dr. Torgerson waited until April 23, 2018, to start this action for defamation against Ms. Nijem.

[3] These facts are all found in the Statement of Claim.

[4] On January 8, 2019, recognizing the limitation problem, the plaintiffs amended their claim to plead that the defamatory words “have been continuously accessed and downloaded by third parties since April 23, 2016” and state that “each instance of a third party accessing or downloading the reviews is a separate and new instance of publication and, therefore, defamation”. The amended claim goes on to state that the plaintiffs only claim damages for harm arising from those who have read the defamatory words since April 23, 2016, which is exactly two years prior to the issuance of the claim, and not for damage arising from those who may have read the posts prior to that date.

The Application of Rule 21

[5] The defendant seeks an order striking out the Statement of Claim on the basis that the action was commenced after the expiry of the two-year limitation period in the *Limitations Act, 2002*, s. 4. The defendant relies on Rule 21.01(1) 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; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

[6] On a Rule 21 motion, no evidence is admissible without leave and no leave was not sought. The matter, therefore, must be decided on the pleading, taking the facts asserted in the pleading as true. The purpose of Rule 21 is to weed out hopeless claims, where it is “plain and obvious that the claim has no reasonable prospect of success”: *Paton Estate v. Ontario Lottery and Gaming Corporation*, 2016 ONCA 458, at para. 12. Consequently, on this motion I must decide, on the basis of the facts pleaded in the Statement of Claim, whether as a matter of law the action is doomed to fail.

[7] The plaintiffs submit that a Rule 21 motion is premature. They argue that the expiry of a limitation period is a defence to an action, and must be pleaded before the legal issue can be considered by the Court. While this may be so where discoverability is in issue, as the plaintiff must be able to respond to the defence, that concern does not arise in this case. Here, Dr. Torgerson specifically pleaded when he became aware of the defamatory publications on the three websites and, moreover, has amended his pleading in an attempt to address the limitation problem by asserting that he can nevertheless sue for the continuing publication on the internet, but only going back two years from the date he commenced the lawsuit.

[8] The Court of Appeal has addressed this issue in a number of cases. In *Beardsley v. Ontario* (2001) 57 O.R. (3d) 1 (C.A.), in considering a Rule 21 motion the Court stated the general rule, at para. 21, that “the expiry of a limitation period does not render a cause of action a nullity; rather, it is a defence and must be pleaded.” However, the Court recognized “that it would be unduly technical to require delivery of a statement of defence in circumstances where it

is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired”.

[9] Subsequently, in *Salewski v. Lalonde*, 2017 ONCA 515, the Court of Appeal observed, at para. 42, that “Beardsley was never intended to apply to a case that is legally or factually complex”. Further, as the *Limitations Act, 2002* is premised on the discoverability rule, the Court questioned, at para. 45, “whether there is now any circumstance in which a limitation issue under the Act can properly be determined under Rule 21.01(1) (a) unless pleadings are closed and it is clear the facts are undisputed.” In *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.*, 2012 ONCA 850 at paras. 114-116, the Court of Appeal noted that it would only be in the “rarest of cases” that a defendant’s motion to strike a claim based on a limitation defence would be entertained. However, the Court noted that this is because the plaintiff must be given a chance to reply and put facts before the Court on discoverability.

[10] In my view, this is one of the rare circumstances in which the limitation issue can be determined prior to the close of pleadings. The facts about when the alleged libels were discovered have been put in the Statement of Claim itself; indeed the plaintiffs have even tried to address the limitation issue in their amendment to the claim. The issues are not “legally or factually complex”. There is nothing for the defendant to plead on this point except the law, which she wishes to do on this motion. It will not distort the pleading process, or be unfair to the plaintiff to proceed with consideration of the legal issue now. Waiting for a defence would serve no purpose and be inefficient.

[11] It is noteworthy as well that the Court of Appeal recently upheld the striking out of a libel action under Rule 21 in similar circumstances – as the plaintiff had failed to comply with the notice and limitation provisions in the *Libel and Slander Act*, RSO 1990, c. L.12: *John v. Ballingall*, 2017 ONCA 579. There the Court only had the Statement of Claim and documents cited in the claim before it (para. 40). I see no substantive difference between that case and the one before me in determining that the limitation issue can, and should, be addressed now.

Application of the *Limitations Act, 2002*

[12] Section 4 of the *Limitations Act, 2002* creates a general limitation period of two years from “the day on which the claim was discovered.” Section 5(2) of the *Act* creates a presumption that the claim is discovered when the act or omission took place, “unless the contrary is proved.” Here, the defendant’s action in publishing the defamatory statements took place on January 18 and 19, 2016, and the plaintiff became aware of them within days, and no later than the end of January, 2016. The defendant therefore submits that it is plain and obvious that the action cannot succeed as the plaintiff did not commence this action until April 23, 2018, more than two years after the actions of the defendant were known, or “discovered”, by the plaintiff.

[13] The plaintiff, however, relies on the “multiple publication” rule, that each publication of a defamatory communication is a separate and distinct libel, subject to its own limitation period. In the context of an electronic communication or publication on the internet, the argument goes, every time a person accesses or downloads the information there is a new claim and a new

limitation period applies. In my view, the plaintiff's position misunderstands the "multiple publication" rule and how it has been applied to the internet.

[14] The "multiple publication" rule dates back to the somewhat infamous case of *Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, in which a cause of action arose after the Duke dispatched his manservant to purchase a back issue of a newspaper from the publisher in order to sue for a libel first published 17 years earlier. This, it was held, constituted a republication by the newspaper, allowing the plaintiff to avoid the limitation period. The "multiple publication" rule established in that case has been subject to criticism, especially in light of the development of the internet. American courts have rejected it, adopting a "single publication rule" in which limitation periods begin to run from the date of first publication: see, e.g., *Firth v. State of New York*, 775 N.E.2d 463 (NY Ct App 2002); *Canatella v. Van de Kamp*, 486 F. 3d 1128 (9th Cir. 2007). And the British have now adopted a somewhat similar approach in s. 8 of the *Defamation Act 2013*, (U.K.) 2013, c. 26.

[15] The multiple publication rule continues to find acceptance in Canada: see, e.g., *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398; *Shtaiif v. Toronto Life Publishing Co. Ltd.*, 2014 ONCA 405. In this case it is not necessary to address the validity of the rule, other than to note that it may be seen as another way of expressing the "repetition rule", where someone has chosen to repeat or re-publish a defamatory statement, as the law provides that every person who repeats a libel is liable as if he or she is the original speaker: see Downard, *Libel* (Lexis Nexis, 3rd Ed., 2014) at paras. 5.32–5.44.

[16] Another form of republication is found in *Breeden v. Black*, 2012 SCC 19, on which the plaintiff relies. Statements posted on the internet in the United States were read, downloaded and republished by newspapers in Ontario, creating a cause of action against the American defendants in Ontario, as the tort of defamation occurs when and where the words are read by a third party, and the republication in Ontario was foreseeable as a natural and probable consequence of the posting of the statements on the internet. This does not mean, however, that every time a person reads the defamatory words in those newspapers a new cause of action arises and limitation periods can be avoided. Applying the discoverability principle, a plaintiff must sue within two years of when he or she becomes aware of the defendant's action in publishing the defamatory words, whether in print or on the internet.

[17] The Ontario Court of Appeal considered republication and the multiple publication rule in *Shtaiif*. There, the plaintiffs had not provided notice of their intention to sue over the print article within six weeks of becoming aware of it, as required by s. 5 of the *Libel and Slander Act*. However, they became aware of the internet publication later and did provide notice of it within the required time. The plaintiffs then sought to include their complaint about the print version in their action against the magazine, relying on s. 6 of the Act which permits adding other claims for libel against the defendant that occurred within the previous year.

[18] The Court considered and rejected applying the single publication rule, as it would be inconsistent with s. 6 of the Act. The analysis in *Shtaiif* must be seen in the context of that case, which dealt with separate publication in two different mediums – print and online. As the Court

of Appeal observed more recently in *John v Ballingall*, at para. 35, *Shtaif* “does not mean that each day of online publication grounds a new cause of action.”

[19] In *John v. Ballingall* the plaintiff had missed the notice and limitation periods for publications by the media under the *Libel and Slander Act*, and argued that “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 Court of Appeal rejected that position, stating, at para. 35:

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 \(CanLII\)](#), 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. [emphasis added]

[20] The plaintiff seeks to distinguish *John v. Ballingall* on the basis that it only deals with notice periods under the *Libel and Slander Act*. While that was the context, the case also engaged the 3 month limitation period under the *Libel and Slander Act*, and the same reasoning must apply. The *Libel and Slander Act* simply creates a shorter limitation period, together with a notice requirement, in recognition of the special position of the media, allowing it the opportunity to publish timely corrections to minimize damage and to prepare defences when facts remain fresh.

[21] In my view, the Court of Appeal in *John v. Ballingall* clearly rejected the proposition that just because defamatory words remain online and are available to be downloaded and read indefinitely, there is continuous publication allowing limitation periods to be ignored. As the Court noted, the multiple publication rule applies when something is “republished across different mediums”. Such republications require specific acts by the publisher, or republisher, to further disseminate, or repeat, the libel, as was the case in *Shtaif*.

[22] Furthermore, to give effect to the amendment in the Statement of Claim would create the potential for endless retriggering of limitation periods simply because the words remain on the internet. This would allow plaintiffs to sit on their rights until it suited them to take action, rather than sue when they become aware of the wrong. This would be unfair to defendants who would be subject to lawsuits indefinitely, and raises concerns about freedom of expression.

Conclusion

[23] In this case there has not been any republication, or even repetition, by the defendant – on the internet, in print, or elsewhere. She published three statements on three websites on two days in January 2016. Those are the statements on which the plaintiffs sue, and they were required to do so within two years “from the point where the internet defamation is discovered.”

[24] As in *John v. Ballingall*, time began to run for limitation purposes when Dr. Torgerson became aware of the statements posted by the defendant on the three websites in January 2016. He was therefore required to issue an action within two years of January 2016, which he failed to do. Accordingly, as a matter of law the action is statute-barred and it is plain and obvious that the action cannot succeed. The motion is granted, and the Statement of Claim is struck out.

Costs

[25] In accordance with the parties’ agreement, the defendant shall be awarded costs of \$6,000, inclusive of disbursements and tax.

Schabas J.

Date: May 30, 2019