SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Ayangma v. Saltwire*, 2018 PESC 48

Date: 20181213
Docket: S1-GS-27914
Registry: Charlottetown

Between:

NOEL AYANGMA

Plaintiff

And:

THE SALTWIRE NETWORK INC.,
operating as THE GUARDIAN,
BARBARA MCKENNA and RYAN ROSS

Defendants

Before: The Honourable Justice Nancy L. Key

Appearances:

Noel Ayangma, on his own behalf
David Hutt, counsel for the Defendants

Place and Dates of Hearing	Charlottetown, Prince Edward Island August 23, 2018
Place and Date of Judgment	Charlottetown, Prince Edward Island December 13, 2018

Practice and Procedure - Preliminary motion to strike portions of Plaintiff's affidavit pursuant to Rules 25.11 - Defamation - Motion and cross-motion made for Summary Judgment pursuant to Rule 20 - Defendant's motion for Summary Judgment granted - Limitation period expired prior to Plaintiff filing Statement of Claim for defamation - Costs

Rules considered: ***Prince Edward Island Rules of Civil Procedure***, Rule 3.02(1); Rule 25.11; Rule 39; Rule 15.01; and Rules 20.01(1) and 20.01(3).

Cases considered: ***CASP v. Canada (Attorney General)***, 2015 PESC 9; ***Hryniak v. Mauldin***, [2014] 1 S.C.R. 87; ***McQuaid v. Government of P.E.I. et al***, 2017 PECA 21; ***Prince Edward Island Protestant Children's Trust v. Marshall***, 2014 PESC 6; ***Lauer v. Vitrak***, 2013 PESC 4; ***Havenlee Farms Inc. v. HZPC Americas Corp.***, 2017 PECA 20; ***MacInnis v. Rayner & Raylink***, 2016 PESC 40; ***Ayangma v. Charlottetown (City)***, 2016 PESC 16; ***Ayangma v. French Language School Board***, 2016 PESC 12; ***Ayangma v. Canadian Broadcasting Corp.***, 2000 PESCTD 86; ***Ayangma v. NAV Canada***, 2001 PESCAD 1; ***Prince Edward Island (Attorney General) v. Ayangma***, 2003 PESCTD 74, reversed on appeal 2004 PEDCAD 11; ***Ayangma v. Canadian Broadcasting Corp.***, 2005 PESCTD 11, affirmed 2005 PESCAD 26; ***Weiss v. Sawyer***, 2002 CanLII 45064 (ONCA); ***Bahlieda v. Santa***, 2003 CanLII 2883 (ONCA); ***John v. Ballingall***, 2016 ONSC 2245 and 2017 ONCA 579; ***Shtaif v. Toronto Life Publishing Co.***, 2013 ONCA 405; CROOKES (need to proof quote/cite); ***Bhaduria v. Persaud***, 40 O.R. (3d) 140 (ONSC).

Statutes considered: ***Defamation Act***, R.S.P.E.I. 1988, Cap. D-5; ***Legal Profession Act***, R.S.P.E.I. 1988, Cap. L-6.1; ***Libel and Slander Act***, R.S.O. 1990, c. L.12.

Key J.:

[1] The Plaintiff, Noel Ayangma (Mr. Ayangma) filed a Statement of Claim against The Saltwire Network Inc., operating as The Guardian (Saltwire), Barbara McKenna (McKenna), and Ryan Ross (Ross) for defamation and by way of an Amended Statement of Claim, claimed Saltwire was negligent in its publication of the Ross and McKenna articles. Mr. Ayangma alleges the publication in the print and online versions of The Guardian newspaper defamed him. He claims special, general and punitive damages.

[2] The Defendants Saltwire, Ross and McKenna (collectively the Defendants) have denied the claim on the following basis:

1) the action is statute barred;

2) no cause of action exists against Ross;
3) neither the Ross or McKenna article is defamatory;
4) substantial indemnity costs.

[3] This decision results from two motions before the court. The Defendants' motion is:

> The motion is for an order for summary judgment dismissing the claims against the Defendants with costs, or alternatively, for an order striking out part of the Amended Statement of Claim and for security for costs against the Plaintiff, Noel Ayangma.

[4] Mr. Ayangma's cross motion is:

> The cross motion is for an order granting the Plaintiff full or partial summary judgment against each of the Defendants listed in the style of cause including: the Defendant Saltwire Network Inc, operating as The Guardian Newspaper, the Defendant Barbara McKenna and the Defendant Ryan Ross.

PRELIMINARY MATTERS:

[5] Counsel for Saltwire noted Mr. Ayangma's responding documents and cross motion for summary judgment were not served and filed on time.

[6] Mr. Ayangma professes familiarity with the Rules of Court and it was unusual that his filings were outside the time limits set out in the Rules given that the parties agreed on the hearing date months in advance. Mr. Ayangma asked for an abridgement of time pursuant to Rule 3.02(1). The court asked for an explanation for the delay and was advised by Mr. Ayangma he had been away on a trip and it had taken him a long time to review and prepare for the hearing. Neither party wanted any further delay in hearing the matters. With the consent of Mr. Hutt, the court agreed to accept Mr. Ayangma's late filings pursuant to Rule 3.02 and proceed with the hearing.

[7] The parties also agreed that rather than have the motions heard consecutively they would be heard at the same time.

[8] Defendants' counsel also raised as a preliminary matter the contents of Mr. Ayangma's affidavit and asked the court, pursuant to Rule 25.11, to strike a number of clauses which counsel submitted, breached the Rules of Court. Counsel stated the vast majority of the paragraphs in Mr. Ayangma's affidavit contained argument, not facts nor facts which supported Mr. Ayangma's belief; and a number of the paragraphs were irrelevant, scandalous, immaterial and in one instance contained bald allegations.

[9] As well, the paragraphs were improperly numbered in that there were no paragraphs 15, 16, 17 or 18 and there were two paragraphs numbered 19. While the court does not strike clauses in affidavits for what are obvious clerical errors, it did immediately strike the second paragraph numbered 19 at the end of the first line. It was clearly a cut and paste insertion from another document which Mr. Ayangma agreed he had completed on behalf of another litigant.

[10] While the court reserved on whether or not to strike a number of clauses in the affidavit, it immediately struck paragraph 12. Paragraph 12 stated:

> [12] THAT I also verily believe that the Defendant Saltwire Network Inc. as a Publisher of the newspaper "The Guardian" was negligent in permitting a both disgruntled and disrespectful journalist who was not only facing at all material times, criminal harassment charges, and had entered into recognizance with specific conditions in other to avoid jail time, to publish online, the type of defamatory materials that she had published about me. ...

[11] Counsel for the Defendants expressed a serious concern because the paragraph, in his view, attempted to reflect on McKenna as being disgruntled and that she was facing charges of criminal harassment. Mr. Hutt referred to this as being "pure scandal" as McKenna's life outside the article she wrote about Mr. Ayangma was immaterial. I agree. Indeed, the piece about McKenna's own troubles was published several months after her opinion piece on Mr. Ayangma and was irrelevant to Mr. Ayangma's claim.

[12] As the court stated during the hearing the particular clause does not follow the Rules and attempts to cast aspersion on McKenna when her personal legal issues had nothing to do with Mr. Ayangma's claim. Mr. Ayangma has previously sued and was unsuccessful in a claim against McKenna when she worked for CBC. The criminal harassment did not involve Mr. Ayangma as a complainant and the clause is scandalous in nature. The court struck paragraph 12.

[13] Mr. Ayangma's affidavit contains 16 paragraphs. Mr. Hutt is correct in saying that much of the affidavit contains argument, opinion, and in the case of paragraph 19, a bald allegation. The court attributes no weight to the points of argument contained in Mr. Ayangma's affidavit, nor to the bald allegation "that the defendants are obsessed and eager to publish defamatory materials against me or decisions that go against me in a timely manner...".

[14] There are several Rules of Court which deal with the contents of affidavits. Specifically, Rule 39 makes reference to what is permitted in an affidavit on a motion.

> **39.01**

...

Contents - Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[15] Paragraphs 1 and 2 of the affidavit are acceptable. The first part of paragraph 3 contains a belief. However Mr. Ayangma's belief as to his success rate in court to which he refers again in paragraph 11 is substantiated by a table also contained in paragraph 11 of his success rate in the Court of Appeal between the years 2000 and 2008. Thus there are facts which support his belief.

[16] Paragraph 4 contains opinion which is not substantiated by fact.

[4] THAT I also verily believe that there is a big legal difference between someone found to have conducted frivolous and "vexatious" proceedings and a "vexatious litigant as suggested by the Defendant Barb McKenna.

[17] Mr. Ayangma's comment in paragraph 5 that the Prince Edward Island Court of Appeal overturned a decision finding him a vexatious litigant in 2003 is accurate. Paragraph 5 also contains an accurate rendering of a number of paragraphs from the 2004 Court of Appeal decision. Paragraph 6 relating to the Court of Appeal's decision that Mr. Ayangma, in 2004, was not a vexatious litigant is a fact.

[18] Paragraphs 7 and 8 are also beliefs which are not substantiated by any factual basis.

[7] THAT based on my rate of success in PEI Court, it cannot be factually said that "***I am not almost always losing***" court as suggested by the Defendant Barb McKenna

[8] THAT to the contrary, to what had been said by the Defendant Barb McKenna, and even though I may not always agree with some of the decisions made by the PEI judges, I do not believe and may be naïve that ***the judges in Prince Edward Island the courts do "shudder" when they see me coming***". Not only none of the PEI judges ever shudder when they see me, to the best of my observation, but most of PEI Judges have been were respectful in Court towards me and towards them equally as such there could be no room to either make the comments which are the subject-matter of my claim against the Defendants.

[19] Mr. Ayangma's beliefs contained in paragraph 9 are substantiated. On review of Exhibit A to his affidavit, one of the impugned articles contains a notation on the bottom of the article that the website known as PressReader, at least at the date the article was printed, January 25, 2018, continued to publish the impugned article online.

[20] Paragraph 10 contains Mr. Ayangma's opinion as to his success rate compared with lawyers on Prince Edward Island and has no factual underpinning.

> [10] THAT not only I verily believe based on my track record even at 46% of rate of success does and cannot make me "vexatious" as a lay litigant this performance in court must be commendable not only a lay litigant conducting his own proceedings in court over a two decades, but also for any trained lawyers.

[21] Paragraph 11 has been dealt with earlier. Paragraph 12 was struck from the affidavit during the course of the hearing. Paragraph 13 is acceptable.

[22] Paragraph 14 expresses an opinion of Mr. Ayangma that he does not agree with the Defendants' position. It is not based on any fact.

> [14] THAT I do not also believe that the suggestion made by the Defendants that the hyperlink was deleted as the result of September 30th 2017's the migration and the suggestion that that after the deletion of the McKenna piece occurred, it was no longer was no longer available online nor do I believe that the suggested updated were only made on September 30th 2017. ***See Exhibit "F" attached to this my Affidavit.***

[23] As noted earlier there are no paras. 15, 16, 17, or 18 located in the affidavit. Paragraph 19 is a bald allegation of Saltwire's alleged obsession with Mr. Ayangma and is in contravention of Rule 39.

> [19] THAT I verily believe that the Defendants are obsessed and eager to publish defamatory materials against me or decisions that go against me in a timely manner they do not do same with the same rapidity when I am successful and sometimes they either do forget or ignore to publish my victories even those against them. ***See Exhibits "G" and H attached to this my Affidavit.***

[24] The decision of Campbell, J. in ***CASP v. Canada (Attorney General)***, 2015 PESC 9 reviewed the rules in relation to affidavit evidence. The decision was relied on by counsel for the Defendants. In that decision the affidavit contained commentary, hearsay, speculation, scandalous allegations, illogical conclusions, and improper opinion. By comparison, Ayangma's affidavit bears little

resemblance to the affidavits discussed by Campbell, J. in what was a motion for recusal. However, the principles for drafting court documents do apply.

[25] The court accepts there are beliefs based on fact which were set out in Mr. Ayangma's affidavit. This does not mean that the court accepts those facts as being true or accurate. The court accepts the parts of the affidavit that comply with the rules as evidence and gives little weight to those statements which do not comply.

[26] Paragraphs 4, 7, 8, 10, 12, and 14 are struck.

SUMMARY JUDGMENT:

[27] Since the Supreme Court of Canada rendered ***Hryniak v. Mauldin***, [2014] 1 S.C.R. 87 and the subsequent amendment of our summary judgment rule to comply with ***Hryniak***, the use of the summary judgment rule has increased significantly in this province.

[28] Rule 20:

> **SUMMARY JUDGMENT**
>
> **WHERE AVAILABLE**
>
> **To Plaintiff**
>
> **20.01** (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.
>
> (2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.
>
> **To Defendant**
>
> (3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
>
> ...

DISPOSITION OF MOTION

General

20.04 (1) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

...

(5) In determining under clause 20.04(1) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

(a) weighing the evidence;
(b) evaluating the credibility of a deponent;
(c) drawing any reasonable inference from the evidence.

[29] Both the trial and appeal courts of this province have issued a number of decisions on the use of the rule. This court does not intend to review those decisions in detail. However, after discussing the evolution of the culture shift since ***Hryniak***, the Court of Appeal in ***McQuaid v. Government of P.E.I. et al***, 2017 PECA 21 had this to say:

> [9] ***Hyrniak*** heralded in a culture shift by moving the emphasis away from conventional trials in favor of proportional proceedings tailored to meet the needs of a particular case with the goal of providing timely and affordable justice.
>
> [10] Rule 20 is one such tool in the arsenal of the justice system to provide timely and affordable justice. The goal is still the same. That is the process of adjudication must be fair and just. However, it is not always necessary to have a full blown trial with all the time and expense associated with that. The proportionality principle means that the best forum for resolving issues is not always the most painstaking procedure (***Hyrniak***, para.28).
>
> [11] Rule 20.04(1) makes summary judgment mandatory where there is no genuine issue requiring a trial (***Hyrniak***, paras.47 and 68). There is no genuine issue requiring a trial when a judge is able to reach a fair and just determination on the merits of the motion for summary judgment. This would be the case where the process: (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result (***Hyrniak***, para.49).

[12] The test on a motion for summary judgment is set out in ***MacPherson v. Ellis***, 2005 PESCAD 10, at paras.18-19:

> The motions judge correctly applied and interpreted Rule 20 in relation to this part of the motion. He cited the test as set out by the Supreme Court of Canada in ***Guarantee Co. of North America v. Gordon Capital Corp.***, 1999 Canlii 664 SCC, [1999] 3 S.C.R. 423. This is a two-part test. The first part requires the moving party to show there is no material fact in issue which would create a genuine issue for trial. The second part of the test provides that when the moving party discharges this onus, the responding party must adduce evidence to establish that the position taken in his pleading has a real chance of success.
>
> **It is important in applying this two-part test to remember the onus is always on the moving party to establish there is no genuine issue for trial raised by the pleading they are attacking, whether it be the statement of claim or the statement of defence**. See: Rule 20.04(2). Once the moving party establishes its right to summary judgment by meeting this onus the responding party assumes the evidentiary burden of showing there is a real chance the position taken in the pleading under attack will succeed thereby negativing the moving party's right to summary judgment. See: Rule 20.04(1). (Emphasis added.)

[30] Since ***Hryniak*** and the local jurisprudence a number of principles which have emerged:

1. The determination of a limitation period is an appropriate use of Rule 20. (***Prince Edward Island Protestant Children's Trust v. Marshall***, 2014 PESC 6) (***Lauer v. Vitrak***, 2013 PESC 4) (***McQuaid v. Government of P.E.I. et al***, supra)

2. Post ***Hryniak***, the amendments to Rule 20 were motivated by the overriding objective of making the civil litigation system more accessible and affordable. ***(Havenlee Farms Inc. v. HZPC Americas Corp.***, 2017 PECA 20, para. 19)

3. As Cheverie, J. stated in ***MacInnis v. Rayner & Raylink***, 2016 PESC 40:

   > [6] ... The main goal continues to be determining a fair process that results in a just adjudication of disputes. ...

4. There continues to be a two-part test in this jurisdiction:

> [8] ...the defendants bear the onus of establishing there is no genuine issue of material fact requiring a trial. Once the defendants have discharged that burden, the plaintiff is required to present evidence establishing a real chance of success. [Para. 8, ***MacInnis***]

5. The party opposing the motion for summary judgment cannot rely alone on his pleadings and must put his "best foot forward." (***MacInnis***, para. 8)

ISSUE: THE LIMITATION PERIOD

[31] The Defendants seek an order granting summary judgment against Mr. Ayangma on the basis that Mr. Ayangma's claim is statute barred. In other words, Mr. Ayangma did not serve notice of his claim or commence his claim until after the limitation period set out in the ***Defamation Act***, R.S.P.E.I. 1988, Cap. D-5.

[32] Sections 14 and 15 of the ***Defamation Act*** state:

> **14. Notice of intended action**
>
> (1) No action lies unless the plaintiff has, within three months after the publication of the defamatory matter has come to his notice or knowledge, given to the defendant, in the case of a daily newspaper, five, and in the case of any other newspaper or where the defamatory matter was broadcast, fourteen days notice in writing of his intention to bring an action, specifying the language complained of.
>
> ...
>
> **15. Action against proprietor or publisher of a newspaper, time limitation for action**
>
> An action against the proprietor or publisher of a newspaper … for defamation contained in the newspaper ... shall be commenced within six months after the publication of the defamatory matter has come to the notice or knowledge of the person defamed; but an action brought and maintainable for defamation published within that period may include a claim for any other defamation published against the plaintiff by the defendant in the same newspaper ... within a period of one year before the commencement of the action.

[33] Wayne Thibodeau is the Regional Managing Editor of The Guardian newspaper. His affidavit, sworn March 9, 2018, provides some of the background

involved in the claim made by Mr. Ayangma. Mr. Thibodeau introduces the court to Ryan Ross, a Guardian court reporter and Barbara McKenna, who was, at the time of the publication of the impugned pieces, an opinion columnist.

[34] The Guardian newspaper is published on Prince Edward Island in print six days per week and is published online as well. Originally owned by a company known as Transcontinental, The Guardian was purchased by Saltwire in early 2017. The Motion Record of the Defendants, at paragraph 22 states:

> 22 In 2017, The Guardian's ownership changed hands. As part of that process, on October 12, 2017, the newspaper's website and content was moved to a new platform owned by Saltwire. For various reasons the decision was made to delete, rather than move, all archived opinion articles, including the McKenna piece. A note was added to the Ross story and all other migrated articles, current to the prior month-end, "updated September 30, 2017." The migrated articles were updated solely to the extent they were moved. Neither the content nor the URL of the Ross story was actually revised or changed.

[35] I find as a fact the pieces alleged as being "updated" contained no further information or opinion against Mr. Ayangma. The update was the move to the new platform. While Mr. Ayangma did not believe or accept that rationale he provided no evidence to the contrary.

[36] Mr. Thibodeau also indicates he was personally served with a 105 page package of documents on October 16, 2017 and this was the first notice to Saltwire of Mr. Ayangma's intention to commence a proceeding. The notice referred to an article by reporter Ross published both in the newspaper and online May 16, 2016 and an opinion piece by McKenna published in the newspaper and online on May 17, 2016.

[37] The claim makes reference to two articles which Mr. Ayangma believes are defamatory to him. First, Ross's article reported the decision of the Supreme Court that Mr. Ayangma was practicing law contrary to the ***Legal Profession Act***, R.S.P.E.I. 1988, Cap. L-6.1 and Rule 15.01 of the Rules of Court.

[38] That decision known as ***Ayangma v. Charlottetown (City)***, 2016 PESC 16 followed an earlier decision of the court known as ***Ayangma v. French Language School Board***, 2016 PESC 12 which dismissed Mr. Ayangma's action. Both decisions were appealed by Mr. Ayangma. While Mr. Ayangma had some success on the appeals of the decisions, the Court of Appeal did not in fact overturn the decisions of the trial judges but rather remitted the cases back to the Supreme Court for rehearing. The appeal decisions were rendered on July 28, 2017, and September 29, 2017.

[39] Mr. Ayangma served notice on Saltwire on October 16, 2017 and filed his Statement of Claim on October 30, 2017, more than 17 months after the publication of the alleged defamatory material. An Amended Statement of Claim was filed on November 30, 2017.

[40] On their face, Mr. Ayangma's notice to Saltwire that he intended to claim and the subsequent claim itself, are well beyond the limitation period set out in the ***Defamation Act***. As per ss. 14 and 15, Mr. Ayangma was required by legislation to give his notice to Saltwire within three months of the publication and file his claim within six months after the publication had come to his notice.

[41] As was pointed out by Defendants' counsel, Mr. Ayangma is familiar with the limitation periods imposed by the ***Defamation Act***. In 2000, Mr. Ayangma sued, among others, the Canadian Broadcasting Corporation (CBC) and Barbara McKenna (***Ayangma v. Canadian Broadcasting Corp.***, 2000 PESCTD 86). Jenkins, J. as he then was, dismissed Mr. Ayangma's claim on the basis that he had commenced his claim beyond the limitation period set out in the ***Defamation Act***.

[42] Mr. Ayangma was the plaintiff in three other suits involving defamation: in 2001 (***Ayangma v. NAV Canada***, 2001 PESCAD 1), again in 2003 (***Prince Edward Island (Attorney General) v. Ayangma***, 2003 PESCTD 74, which was reversed on appeal in 2004 PESCAD 11), and finally, in 2005 (***Ayangma v. Canadian Broadcasting Corp.***, 2005 PESCTD 11, affirmed 2005 PESCAD 26). The cases just cited did not involve the issue of a limitation period. However, Mr. Ayangma, having been caught on the limitation period issue in 2000, and with his subsequent litigation experience, would have been well aware of the restrictions set out within the relevant legislation.

[43] But, as Mr. Ayangma submits, "this is different." In one respect he is correct. The publications dealt with in the four cases mentioned above were either printed articles or CBC broadcasts.

[44] In the case at bar, The Guardian published the two articles in print, and online. In Mr. Ayangma's view the pieces were published and republished online and each "updated" article was a republication thereby extending the limitation period in which to claim the pieces were defamatory.

[45] Mr. Ayangma's position is that ss. 14 and 15 of the ***Defamation Act*** do not apply to online articles. Mr. Ayangma is correct that the issue of whether online publications are subject to the ***Defamation Act*** has never been decided in this province. In his factum, Mr. Ayangma quotes extensively from a decision known as ***Weiss v. Sawyer***, 2002 CanLII 45064 (ON CA). He also cites ***Bahlieda v. Santa***, 2003 CanLII 2883 (ON CA) which discussed whether material placed on a

website was broadcast within the meaning of Ontario's ***Libel and Slander Act***, R.S.O. 1990, c. L.12.

[46] The Ontario Court of Appeal held that the determination of the word "broadcasting" in ***Bahlieda*** raised a genuine issue for trial and overturned the motion judge's summary judgment decision.

[47] However, ***Bahlieda***, in the sense of the internet, is old law. The issue of online publication has since been decided by the Ontario Superior Court of Justice and confirmed on appeal. While Mr. Ayangma is correct in stating Prince Edward Island courts have not weighed in on the issue, this court will now do so applying the rationale in ***John v. Ballingall***, 2016 ONSC 2245 and 2017 ONCA 579.

[48] The defendant in ***John*** used Rule 21, not 20. However, the principles are instructive. In the ***John*** decision, the plaintiff was a rapper who sued the respondents for libel as a result of an online article. As in this case, the article was published on the newspaper's, the Toronto Star's, website. Trimble J. of the Ontario Superior Court of Justice permitted the defendants' motion to dismiss the claim pursuant to Rule 21 of the Ontario Rules of Court, a rule virtually identical to that which exists in Prince Edward Island. The ***John*** motion concerned one issue: whether or not the notice and limitation periods in the ***Libel and Slander Act*** of Ontario applied to the Toronto Star's online version. Trimble J. determined that the legislation applied to online news. The Ontario Court of Appeal agreed with Justice Trimble's interpretation of the ***Act***. At para. 20 the court states:

> [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.

[49] The appellant in the ***John*** decision argued, as does Mr. Ayangma, the legislature clearly intended not to include online versions of a newspaper because there had been no amendment to the ***Libel and Slander Act*** to cover internet publications.

[50] The court disagreed with that position:

> [22] I do not agree. In *Weiss v. Sawyer* ... this court considered the issue and concluded that a newspaper does not cease to be a newspaper when it is published online. ...
>
> [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 ... 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.]

[51] This court agrees with and adopts the Ontario Court of Appeal position. To do otherwise and thereby restrict the definition of newspaper to the print version only would allow what is now often unrestrained, provocative, rude and politically incorrect commentary to run rampant simply because the comments were not made on newsprint.

[52] Mr. Ayangma submits that a publication in a newspaper exists the day the paper is printed and then disappears. His position is that each and every time the articles of Ross and McKenna appeared online they were a republication of the original piece. In the ***John*** decision the appellant suggested 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." (***John***, para. 34). Mr. Ayangma relied on ***Shtaif v. Toronto Life Publishing Co.***, 2013 ONCA 405.

[53] The Court of Appeal in ***John*** disagrees with that argument. At para. 35 Benotto J.A. finds:

> [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 (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.

[54] I agree. Applying the above principles to the case at bar, I find the limitation period for each of the impugned articles ran from the point when the alleged internet defamation was published, namely, May 2016. While, unsurprisingly, the factual situation in ***John*** is not identical, this court adopts the principles set out in both the decision of the motions judge and that of the Court of Appeal.

[55] Nor does the hyperlink, referred to by Mr. Ayangma in the Ross publication, constitute a republication of the article. Interestingly, Mr. Ayangma takes no issue with the material published in the Ross article.

[56] Rather, it is the hyperlink which directs the reader to McKenna's article which causes Mr. Ayangma concern. Counsel for Saltwire describes a hyperlink at para. 78 of his factum:

> 78 A hyperlink does not republish the linked content. At law a hyperlink is no more than a reference. This issue was addressed definitively in *Crookes v Wikimedia Foundation Inc.* [2011], 3 SCR 269, 2011 SCC 47: "[t]o succeed in an action for defamation, the plaintiff must prove on a balance of probabilities that the defamatory words were published" (para 1), and "[m]aking reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content" (para 42) ...

[57] Mr. Ayangma submits the ***Crookes*** decision can be distinguished from his own factual situation because:

1) McKenna and Ross worked for the same employer, Saltwire;
2) McKenna did not own a specific website;
3) The Ross and McKenna pieces linked the readers to the same website owned by Saltwire; and
4) The hyperlink included in the Ross article encouraged or invited viewers to read the McKenna piece.

[58] I disagree. The ***Crookes*** decision is the law. A hyperlink is no more than a reference and does not constitute, without more, a republication.

DISCOVERABILITY:

[59] Mr. Ayangma raised the issue of the discoverability rule and submitted he did not become aware of the online articles until they were brought to his attention by his friend Mr. Moussa in October, 2017. Mr. Ayangma acted as agent for the Moussa family in British Columbia in late September and early October, 2017 in their dealings with the British Columbia Human Rights Tribunal. A portion of the costs decision is set out as Exhibit A to Mr. Moussa's affidavit. Mr. Ayangma's purpose in providing the portion of the decision was to prove to the court he was in British Columbia in the fall of 2017.

[60] In Mr. Moussa's opinion, as set out in his affidavit at para. 11:

> 11. THAT to my biggest surprise, after reading the two pieces of information I found on the internet, I quickly realized that, based on Mr. Ayangma's reaction who appeared to be completely surprised, sadden and shocked to read what was said about him, that Mr. Ayangma was not aware of either pieces of information;

[61] Mr. Ayangma's position is that he did not discover the impugned pieces until fall, 2017. He disputes Saltwire's contention that he subscribed to The Guardian newspaper, or the online version. Such a position lacks credibility.

[62] However, Mr. Ayangma provides no evidence of or explanation for what he was doing in the 17 months prior to notifying Saltwire of the suit.

[63] Contrary to Mr. Ayangma's position that he is not a subscriber to The Guardian, it is the evidence of Mr. Thibodeau whose affidavit stated:

> In my years with The Guardian Mr. Ayangma has contacted me many times to comment on a story we have published or to request we investigate and report on an issue of interest to him. (paragraph 14)

[64] Mr. Ayangma's own affidavit at paragraph 19 disputes his submission he has no subscription, and thus perhaps, pays little attention to what Saltwire publishes:

> [19] THAT I verily believe that the Defendants are <u>obsessed</u> and <u>eager</u> to publish defamatory materials against me or decisions that go against me in a timely manner they do not do same with the same rapidity when I am successful and sometimes they either do forget or ignore to publish my victories even those against them. ... (my emphasis)

[65] Essentially, Mr. Ayangma submits the limitation period commenced when he discovered the Saltwire articles. This is a subjective approach. The case law states otherwise.

[66] The ***Defamation Act*** reads as though it sets a subjective standard. Sections 14 and 15:

> **14.** ...
>
> (1) ... within three months after the publication ... has come to his notice or knowledge ... (my emphasis)
>
> **15.** An action ... shall be commenced within six months after ... the defamatory matter has come to the notice or knowledge of the person defamed ... (my emphasis)

[67] However, the courts' interpretations are determined by the objectively reasonable person. In terms of the limitation period the law asks: Would a reasonable person exercising reasonable diligence have found the articles?

[68] The onus is on Mr. Ayangma to exercise reasonable diligence. The evidence before the court suggests Mr. Ayangma was in a position to know about the articles. A reasonable person would have found the articles exercising reasonable diligence.

[69] Defendants' counsel referred to ***Bhaduria v. Persaud***, 40 O.R. (3d) 140 (ONSC). Mr. Bhaduria was a Member of Parliament whose claim for defamation was dismissed on a motion for summary judgment. The claim was statute barred.

[70] Section 5 of the ***Libel and Slander Act*** of Ontario uses similar language to the ***Defamation Act***. The court determined the words "come to the plaintiff's knowledge" have an objective component.

[71] In ***Bhaduria***, Ferrier J. concludes:

> 23 Therefore, it is my conclusion that the *Libel and Slander Act* limitation period must be treated as having an objective component. It is sufficient that the plaintiff could reasonably have known of the libel; it is not necessary that actual knowledge on the part of the plaintiff be demonstrated.

[72] I agree. In his Amended Statement of Claim for defamation Mr. Ayangma uses the following expressions:

> [4] The Plaintiff is not only well-known in the Province of Prince Edward Island, but also within the Canadian judicial system having conducted litigations in several provincial jurisdictions including in Prince Edward Island, New Brunswick, Nova Scotia,

Manitoba, Newfoundland, British Columbia, Quebec and as well as the Federal Courts sphere.

[5] The Plaintiff states that most of his the litigations conducted over almost two decades (between 1995-2017), were in Prince Edward Island. These litigations have systematically been reported by the Defendant, the Saltwire Network Inc. Operating and its journalists and columnists Ryan Ross and Barbara MacKenna.

[6] ... "the Guardian" is a local and most popular daily newspaper... In addition the Guardian also possesses an E-Edition ... for a wider audience and publication.

[9] ... the Defendant ... had a special and continued interest in the Plaintiff and his family's affairs for almost two decade ...

[10] ... the Defendants ... had been obsessed with the Plaintiff and his family's affairs ...

[36] ... the Defendants chose to communicate ... to a potentially vast global audiences.

[73] These are not the sentiments of a person who pays scant or no attention to the publications of Saltwire. Mr. Ayangma could have, with reasonable diligence, discovered the articles in question. The argument on discoverability fails.

CONCLUSION:

[74] In conclusion:

1) Mr. Ayangma's Statement of Claim is statute barred in that Mr. Ayangma's claim was outside the limitation period set out in the ***Defamation Act***. Saltwire's motion for summary judgment is granted.

2) Given that the Defendant has been successful in its motion for summary judgment as set out above, it is unnecessary to consider whether or not the articles were defamatory.

3) Based on the decision in number 1 above, Mr. Ayangma's motion for full or partial summary judgment is dismissed.

4) Because summary judgment has been granted, it is unnecessary to determine the motion to strike the claim as against Ross or the motion for security for costs.

COSTS:

[75] Counsel for Saltwire stated that he would prefer to deal with the issue of costs after the decision of the court was rendered. Mr. Ayangma agreed. Saltwire is the successful litigant. It shall have its costs on a partial indemnity basis. The parties shall make an effort to agree on the quantum of costs. If they are unsuccessful in coming to an agreement then either party may apply to the court for directions.

_____

J.

December 13, 2018