

Limitation period avoided: Claims of republication of libel by third party allowed to be added action because stories were on internet

Defamation | Limitation Periods | Litigation | Litigation & Dispute Resolution | Torts

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Across the country, limitation periods have been enacted to regulate the time in which an action can be commenced. Defendants are entitled to finality, and therefore an action that is started outside of a limitation period is improper and will be dismissed.

Limitation periods apply to defamation actions. However, as demonstrated in the recent decision of *Terrigno v. Butzner*, 2021 ABCA 18, a statutory limitation period can potentially be avoided in certain circumstances. Here, Alberta's general limitation period did not prevent the plaintiff from amending his statement of claim to add claims against the defendant for republication by a third party of defamatory comments years after the alleged defamatory statements were first made and published. Critical to the case was that news stories published by the third party were available online.

The underlying facts to the plaintiff's action began on 27 February 2015 when following a Calgary Planning Commission hearing, the plaintiff and defendant got into argument over a land re-designation. The defendant told a Calgary Herald reporter about the exchange. A series of media articles followed and the plaintiff's land re-designation got rejected.

On 24 February 2017, an action was commenced by a company against the defendant and others in connection with the rejected land re-designation. Among other causes of action, the defendant was accused of "making defamatory comments about alleged threats made by an agent" of the company. The agent was not identified by name and the plaintiff was not a party to the claim. This claim was later amended to add the plaintiff and to only seek recovery against the defendant. The amended claim further particularized that the defendant had made defamatory comments specifically about the plaintiff to the reporter.

In December 2019, the plaintiff sought to amend the claim again to add claims of republication by the Calgary Herald. In support of his motion that the claims of republication should be added despite the expiry of the general limitation period, the plaintiff argued that since the articles were available online the running of the limitation period started afresh every time someone accessed the article.

The plaintiff further argued that the allegations contained all of the necessary elements to fall within s.6(2)(b) of *Alberta's Limitations Act*. Under this section, a defendant is not entitled to immunity even though a limitation period has expired if the added claim is "related to the conduct, transaction or events described in the original pleading in the proceeding."

This statutory provision is similar to findings made by Ontario Courts that permit a party to add a new cause of action to a claim after the expiry of the applicable limitation period provided that the party can show that substantially all of the material facts giving rise to the new cause of action were pleaded in the original claim. See for example *Klassen v. Beausoleil*, 2019 ONCA 407 at paragraphs 26-29.

The court recognized that while a defendant was not generally responsible for a third party's republication, they could nevertheless be liable for each republication if:

- (1) the defendant has authorized the republication;
- (2) the republication is the “natural and probable consequence” of the defendant’s initial publication; and
- (3) the republication was foreseen or reasonably foreseeable by the defendant.

Here, even though the plaintiff was aware of the republication at the time the articles were originally published, the Alberta Court of Appeal was not satisfied that the proposed amendments were hopeless as a result of s. 6(2)(b).

Although the defendant and the lower court judge relied upon *AARC Society v. Canadian Broadcasting Corporation*, 2019 ABCA 125 for the proposition that for the defamer to be responsible for a republication that remains online, the defamer must have control over the republication or the website where the defamatory material has been posted, the court held, at paragraph 17, that AARC had not determined whether a defendant found responsible for republication by a third party could also be found liable for internet republication by the third party despite the defamer’s lack of control over the third party’s website.

The law about whether a defamatory statement available on a website constituted a new publication which gave rise to a new cause of action every time the statement was accessed by a third party had also not been determined in Alberta.

In Ontario, this issue has been commented upon in *John v. Ballingall*, 2017 ONCA 579. In that case, the plaintiff had missed the statutory notice and limitations periods for publications under the *Libel and Slander Act*. The plaintiff contended 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 this argument, stating, at paragraph 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 *Shtailf*, the court rejected the notion that the limitation 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 *Shtailf*. 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 *Shtailf*. 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...*Shtailf* does not support that proposition...any limitation period based on discoverability will run from the point where the internet defamation is discovered.

None of the Ontario cases were referred to by the Alberta Court of Appeal in its decision. Accordingly, it will be interesting to see if the limitation period defences raised by the defendant will ultimately prevail and whether the plaintiff’s current victory to amend his pleadings will be for naught. If the Alberta courts ultimately determine that every time someone accesses an online publication it gives rise to a new cause of action, the conflicting decisions between provinces could theoretically result in the matter requiring clarification from the Supreme Court of Canada at a future date. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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