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Criminal proceedings and the civil defamation claim: A limitation period lesson

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In Ontario, section 4 of the *Limitations Act, 2002* establishes a general two-year limitation period for commencing an action from the date the action is discovered. Section 5(1)(a) of the Act provides a checklist of factors to establish when a claim is discovered. Although section 5 was modelled along the lines of the common law "discoverability" principle, section 5(1)(a)(iv) departs significantly from the common law principle by adding that a claim is discovered on the earlier of the day on which the person with the claim first knew "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it."

How does this subsection impact a civil defamation claim when the person who alleges that he or she has been defamed is also facing criminal proceedings that arise from the allegedly defamatory information provided to the police?

In *Kulyk v. Guastella*, 2021 ONSC 584, Justice Myers determined that the existence of criminal proceedings resulting from defamatory statements to the police did not defer the start of the limitation period for a civil defamation claim against the complainant under the Act. Accordingly, a defamation claim commenced by the plaintiff four years after he was charged with multiple counts of fraud and assault as a result of a complaint made against him by his ex-spouse was dismissed on the grounds that it was statute-barred.

The plaintiff and the complainant had divorced in 2011 and three years later, the complainant made a statement to the police which led to charges being laid against him on April 12, 2014. At the time, the plaintiff was told by police about the allegations that had been made against him, and month later his lawyer was provided with a complete disclosure package. The disclosure package contained a full description of the complainant's allegations.

However, the plaintiff did not bring a defamation action against the complainant until August 3, 2018 – more than four years later.

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On a motion to dismiss the plaintiff's action for being statute-barred, the plaintiff argued that despite having knowledge of the elements for a cause of action in defamation against the complainant, the time period for the commencement of the limitation period did not start until the criminal charges were fully dealt with. In the plaintiff's view, this date was February 9, 2017 when the Crown withdrew charges against him.

The plaintiff argued that he did not start a civil action against the claimant within two years of the date of being told by police about the complainant's allegations because he was under enormous stress and was totally focused on dealing with the criminal charges. He contended that his financial resources were need to deal with defending the criminal charges and that it was not appropriate to have commenced a civil action against the complainant because had he been found guilty, a civil action would not have been successful. The complainant's allegations to the police would have been accepted as true beyond a reasonable doubt, and the doctrines of issue estoppel and abuse of process would have applied against the plaintiff.

In defending the motion to dismiss the action, the plaintiff relied on *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 and *Chimienti v. Windsor (City)*, 2011 ONCA 16. In these cases, it was determined that the limitation period for a civil claim for negligent police investigation and malicious prosecution, respectively, did not run until criminal charges failed.

In *Chimenti*, Justice MacPherson wrote:

> I also have sympathy for the appellants' policy arguments. In my view, it is unrealistic to ask a person already preoccupied with defending a criminal charge to take on the additional effort and cost of mounting a civil action, particularly given the likely unfounded but understandable concern that, in doing so, he might antagonize the police and Crown counsel. Furthermore, there is something of a logical inconsistency in asking a civil court to rule on the propriety of a criminal prosecution before the criminal court has had the opportunity to assess the merits of the underlying charge.

The plaintiff also relied on the Court of Appeal decision in *Winmill v. Woodstock (Police Services Board)*, 2017 ONCA 962 wherein it was determined that the limitation period did not commence to run for a claim alleging assault against police until charges against the plaintiff arising out of the plaintiff's arrest were dealt with.

According to the plaintiff, the nexus between the criminal charges against him and his civil defamation action represented "two sides of the same coin", as that phrase was used in *Wimmill*.

For Justice Myers, the key word in section 5(1)(a)(iv) of the Act was "appropriate".

It has been held that this word means "legally appropriate". In the view of Justice Sharpe in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, this means that s. 5(1)(a)(iv) does not permit a person to delay the commencement of an action for tactical or other reasons beyond the general two year limitation date from when the claim was fully ripened.

As well, with respect to the phrase "two sides of the same coin", Justice Myers found that

the cases relied upon by the plaintiff were distinguishable because all of them involved actions against police.

Here, the plaintiff's defamation claim was against the complainant, not the police.

Thus, His Honour was persuaded that the plaintiff's case was similar to *Sosnowski v. MacEwan Petroleum Inc.*, 2019 ONCA 1005 wherein a plaintiff had started an action against his former employer six years after he had been accused of theft from it. While the action was started within one year of the plaintiff's acquittal from the theft charges, it was statute-barred.

Justice Myers noted as well that the *Sosnowski* decision strongly cautioned against allowing subjective, evaluative concerns (such as financial circumstances or psychological state of mind) from becoming grounds to find that an action was not "legally appropriate" for the purposes of s. 5(1)(a)(iv) of the Act.

The plaintiff, in *Kulyk*, was at the latest aware of the complainant's comments to police by May 2014, and therefore his action needed to be started before May 2016. By starting the action in August 2018, the plaintiff's claim was clearly statute-barred.

Limitation periods can be tricky and with the move to a shorter limitation period in Ontario in 2004 from what was a six-year limitation period previously, there is sometimes much pressure on a plaintiff to make a decision to sue quickly. Although section 5(1)(a)(iv) can delay the running of a limitation period, a case like *Kulyk* demonstrates that it is always better to start an action within two years of gaining knowledge of a wrong. Based on Justice Myers' decision, the lesson for plaintiffs is that if they feel that a complaint to police contains defamatory comments, they should not await the outcome of criminal proceedings that arise out of those comments before commencing a civil defamation claim, especially if a plaintiff's action is not against the police.

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