

ONTARIO SUPERIOR COURT RULES ON THE INCLUSION OF THE INTERNET AS A “BROADCAST” MEDIUM

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The Ontario Superior Court recently ruled that the posting of defamatory material on the internet constitutes a “broadcast” of such material pursuant to the provisions of the *Ontario Libel and Slander Act (Bahlieda v. Santa, (2003) O.J. No. 1159, April 2, 2003, Pierce J.)*.

The facts

The Plaintiff was a clerk of the City of Thunder Bay and the Defendant was a City Councillor. The Plaintiff initiated legal proceedings against the Defendant alleging that defamatory material was posted on the Defendant’s web site on May 10, 2001 and she only learned of the existence of such posting in July 2001. There were also allegations of defamatory statements made by the Defendant via fax.

The *Ontario Libel and Slander Act* provides that prior to initiating legal proceedings for libel in a broadcast, a person must give notice, in writing, and not more than six weeks from the knowledge of the broadcast, that he or she intends to commence proceedings. The action must thereafter be taken no more than three months after the person first gained knowledge of the defamatory statements (Sections 5 and 6 *Libel and Slander Act*). In this case, although the Plaintiff had knowledge of the defamatory statements as of July 15, 2001, the notice was made in writing on November 14, 2001 and the Statement of Claim was issued on January 8, 2002.

The issues at bar

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The Defendant moved for Summary Judgement, alleging that there was no genuine issue for trial on the grounds that part of the Plaintiff's action was barred by statute for failure to give notice within the six week timeframe set out in the *Libel and Slander Act*. Pierce J. was seized of determining whether or not all or part of the case should proceed to trial.

The Superior Court ruling

The Court first reviewed the question of whether or not an internet posting could be considered as a "broadcast" within the meaning of the Ontario *Libel and Slander Act*, that reads:

"1(1) "Broadcasting" means the dissemination of writing, signs, signals pictures and sounds of all kinds intended to be received by the public either directly or indirectly or through the medium of relay stations, by means of,

(a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radio telephone, or

(b) cables, wires, fibre-optic linkages or laser beams,

and "broadcast has a corresponding meaning(.)"

The Plaintiff argued that the term "broadcast" did not include the internet and the Defendant argued to its inclusion in the definition of "broadcasting" found in the Ontario *Libel and Slander Act*. Pierce J. considered two experts' reports in order to determine if the internet was a broadcast medium as defined in the Ontario *Libel and Slander Act*. The experts essentially agreed on the definition of the internet and although the expert opinions differed on the questions of Internet applications, its infrastructure and the similarities between internet and traditional broadcasts, such as radio and television, the Trial Judge came to the conclusion that the internet was in fact a "broadcasting" medium.

On the issue of whether or not the posting of defamatory material on the internet is a "broadcast" in accordance with the definition of the *Libel and Slander Act*, Pierce J. writes:

"51 The purpose of broadcasting definition is to single out information which is transmitted to mass audiences, where maximum harm to reputation can be done. Traditionally, this involved radio and television. In 1980, when the internet was in its infancy, and not widely available, the *Act* was amended to

incorporate technology applicable to cable TV. The Legislature obviously sought to clarify the inclusion of cable television in the scope of the Act, recognizing the size of its audience.

52 The court must recognize and give effect to the purpose of the *Act*, including the mischief it seeks to ameliorate. In this *Act*, that harm is widespread damage to reputation when a mass audience receives defamatory material. That is the rationale for applying particular rules to broadcasting that do not apply to other forms of defamatory communication. It is the reason for the notice period, and the limitation found in sections 5 and 6.

53 The internet, sometimes more than traditional broadcast media, reaches a mass audience. It uses the same infrastructure common to radio and television, as set out in the *Act*. I conclude therefore, that placing material on the internet, via a website, where it may be accessed by a large audience, constitutes broadcasting within the meaning of the *Libel and Slander Act*."

The Trial Judge therefore concluded that if the posting of defamatory material on the internet was a "broadcast" in accordance with the Ontario *Libel and Slander Act*, then the Plaintiff had the obligation to give notice to the Defendant of her intention to initiate proceedings for slander within six weeks of her knowledge of the slanderous statements and she also had the obligation to commence her action within three months of such knowledge. She the Plaintiff had failed to act within the limitation periods, Pierce J. concluded that there was no genuine issue for trial as concerned the action based on the internet "broadcasts".

The Plaintiff had also argued, in order to counter the Defendant's limitation argument, that since the defamatory material continued to be posted on the Defendant's internet web site until June 2002, her November 14, 2001 notice to the Defendant captured the "broadcast" of the prior month. Pierce J. disagreed, ruling that the monthly posting of the defamatory material did not give rise to a new cause of action based on republication. The Trial Judge ruled that had the Plaintiff given her notice and commenced her action within the delays set out in the *Libel and Slander Act*, she then could have claimed for any defamatory broadcast by the Defendant up to one year prior to the commencement of the action in accordance with section 6 of the *Libel and Slander Act*.

The Trial Judge therefore granted, in part, the Defendant's Motion for Summary Judgement ruling that the Plaintiff's action for slander on the internet was barred by statute.

Conclusion

This case therefore confirms that the internet constitutes an powerful and recognised broadcasting medium. In addition, it serves as a reminder to both clients and their counsel that swift action is required in situations there may be allegations of defamation on the internet, or through any other medium for that matter. Each province may have its own limitation periods and statutes as concerns defamation, but the term “broadcast” will likely continue to be defined in each province as including the internet.

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