Date: 20001229
Docket: S.Y. 6116

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Butler v. Southam Inc., 2000 NSSC 102

BETWEEN:

D. WAYNE BUTLER, FLOYD HEMEON, HEIKKI MUINONEN, MILLARD MACKENZIE AND LEE KEATING

PLAINTIFFS

- and -

SOUTHAM INC. as publisher of THE DAILY NEWS and PARKER BARSS DONHAM

DEFENDANTS

D E C I S I O N

HEARD: at Halifax, Nova Scotia, before the Honourable Justice D. Merlin Nunn, on December 13 and 14, 2000 (in Chambers)

DECISION: December 29, 2000

COUNSEL: W. Dale Dunlop, on behalf of the Plaintiffs
Alan V. Parish, Q.C. and Brian Casey, on behalf of the Defendants

NUNN, J.:

[1] The action in this matter alleges defamation of the plaintiffs by the defendants. For some reason these separate files have been opened, namely SH-00-164385, which contains only the Notice of Intended Action; SH-00-164585 containing an Originating Notice Inter Partes and an Application to Strike the Notice of Intended Action; and S.Y. No. 6116 containing the Originating Notice (Action) together with an application to strike all of the notice of intended action, the action itself and the Statement of Claim. At this hearing I directed that all three files be consolidated under file S.Y. No. 6116.

[2] The application before me was requesting the following orders:

1. Order pursuant to Rules 14.25 and 25 of the Civil Procedure Rules, and Section 18(1) of the **Defamation Act** striking both the Notice of Intended Action and the action itself as out of time.

2. Order pursuant to Rules 14.25 and 25 of the **Civil Procedure Rules** and Section 18(1) of the **Defamation Act** striking the Statement of Claim as out of time.

3. Order pursuant to Rules 14.25 and 15 of the **Civil Procedure Rules** striking the Statement of Claim as not disclosing a cause of action in that the words complained of are not capable of referring to the plaintiffs

[3} Rule 14.25 empowers the Court to strike any pleading on the ground that "it discloses no reasonable cause of action". Rule 25 empowers the Court at anytime

prior to trial to "determine any question of law ...", and, where that determination "substantially disposes of the whole proceeding, or any cause of action . . . the Court may thereupon grant such judgment or make such order as is just."

[4] Section 18(1) of the **Defamation Act,** R.S.N.S. 1989 c. 122, states:

> "No action shall lie unless the plaintiff has, within three months after the defamatory matter has come to his notice or knowledge, given to the defendant, in the case of a daily newspaper ... fourteen days notice in writing of his intention to bring action, specifying the defamatory matter complained of."

Timeliness of the Notice of Intended Action

[5] This is the first of the applications for this Court to consider. On this issue it is appropriate for the Court to receive evidence and, in this regard, affidavits were filed by each of the plaintiffs and each was cross-examined.

[6] In his affidavit the plaintiff Keating stated that he was employed at the Nova Scotia School for Boys/Shelburne Youth Centre from 1959 to 1989, in various positions up to chief supervisor at the time of his retirement. At the time when the Institutional Abuse Compensation Program was being established in Nova Scotia a

series of articles authored by the defendant Donham and others appeared in the Halifax Daily News, a daily newspaper circulated throughout Nova Scotia. He read these articles at the time they were published, discussed them with other past employees, receiving little enthusiasm to commence legal proceedings, and, more importantly discussed them with one Cameron MacKinnon, a lawyer, who was representing current employees, who also discouraged any action. He states that he wrote two letters to the editor criticizing the articles and denying any involvement in any abuse, neither of which was published.

[7] In 1997 he was instrumental in forming a group, the Past Employees for Restoratative Justice and has been active in its activities.

[8] He further states that it was only in the Spring of 2000 that they were able to obtain a solicitor to undertake their case against the defendant.

[9] On cross-examination he acknowledged that he was not under any disability, physical or psychological. With regard to the series of articles he admitted that he had a telephone conference and met with Cameron MacKinnon a number of times and, though he says MacKinnon did not advise of time limits, his advice was not to

commence any suit as it was not worthwhile to proceed. Some of these advices were given during regular Thursday afternoon meetings of the group of past employees which Cameron MacKinnon attended from time to time. All of the plaintiffs attended these meetings with occasional absences.

[10] The plaintiff Millard MacKenzie deposed that he was employed at the Shelburne Youth Centre from 1964 to 1967 and from 1968 to 1975. He refers to the series of articles published by the defendant as commencing in 1996. He indicates there was discussion of legal action at several meetings of the Past Employees for Restorative Justice and the general feeling was that they could not take action. He also was informed by others in the group that they had discussed the matter with other lawyers and none were willing to take the case. He states that it was only in 2000 that their present lawyer advised that the articles were defamatory and he would be prepared to take their case asserting that this was his first opportunity to bring a claim.

[11] On cross-examination he indicated that he had no disability, that he read the articles at the times they were published, that there was talk of commencing action in the group meetings and that he was aware that MacKinnon had advised the group.

[12] The plaintiff Butler deposed that he was employed at the Shelburne Youth Centre from 1971 to 1995 in the positions of counsellor, acting supervisor and acting senior counsellor. From October 2, 1995 to the present he is on long term disability, having been diagnosed with severe depression as a result of the allegations of former residents of the Centre. He consulted four different lawyers concerning these articles and received no advices or assurances that a defamation suit was a practical undertaking.

[13] He also wrote a letter to the editor complaining about the articles as one-sided and untrue which never was published.

[14] On cross-examination he indicated that though suffering severe mental depression he did perform the usual daily activities, drove his car, attended appointments, was aware of the articles as published, wrote the letter to the editor. He also indicated that Cameron MacKinnon did not encourage suit.

[15] In his affidavit he indicated that he was interviewed and appeared on CBC's Fifth Estate, taped in March, 1998, for later presentation and at the time of this taping,

the defendant Donham was present and he confronted Mr. Donham that the allegations were untrue but that no attention was paid to him.

[16] The plaintiff Hemeon deposed that he was employed at the Shelburne Youth Centre from 1981 to the present and that the allegations had a profound personal effect upon him, fearing being charged and improperly convicted for crimes he had not committed, causing him to withdraw from society and having emotional problems. All this led to his going on long term disability for depression and other mental health problems. He states that on many occasions he thought about taking legal action against the defendants but did not have the emotional strength to bring action on his own.

[17] On cross-examination he admitted attending the meetings in 1996 and 1997 with Cameron MacKinnon where the issue of suing the defendant newspaper was the main issue discussed. He also testified that though he was depressed with poor mental health he drove his car, managed his affairs (with some help from his wife), attended meetings, and understood both what was going on and the advices received.

[18] The plaintiff Muinonen deposed that he was employed at the Shelburne Youth Centre from 1974 to 1995, as assistant superintendent and superintendent, then transferred to a government position in Halifax, retiring in 1997. He states that he believed as a civil servant he was precluded from taking action against the defendant newspaper and to do so could lead to disciplinary action. He based this belief on the official position of the government of the day being that widespread abuse had occurred and claimants were to be compensated. He says he did discuss one article, in September, 1997, with Cameron MacKinnon whose advice was there was nothing he could do.

[19] He also was on stress leave for a period prior to his retirement alleging this stemmed from the widespread allegations of the defendants. His condition improved by mid 1988 and he participated regularly in the Past Employees for Restorative Justice.

[20] He states that it was only in the Spring of 2000 when the group decided to obtain another opinion regarding a defamation suit that he learned such a suit was possible.

[21] On cross-examination he indicated that while under stress he had no difficulty managing his affairs, financial and otherwise and conducting his daily activities. Also after he retired he did not feel precluded from taking any action. By 1998 his health had been restored.

[22] I should make it clear that each of the plaintiffs have categorically denied being aware of, involved with, participated in or committed any abuse during their employment at the Shelburne Youth Centre.

[23] There is a further affidavit filed by the plaintiffs of Joseph Simatovic in which he indicates he downloaded from the Daily News internet site the articles posted under the subheading "Systems of Abuse" from December 1, 1997 to June 17, 1998.

[24] A number of affidavits were filed on behalf of the defendants, four of which, those of Cathy Nicoll, Robert Martin, David Rodenhiser and the defendant Donham are essentially to the effect that their notes, tapes of interviews are long destroyed or recycled and even some of the sources of their information are forgotten and had they received timely notice they would have been better able to preserve the necessary

information for defence of the suit. Both Donham and Rodenhiser were cross-examined and I will deal with that in a moment.

[25] There is one further affidavit, that of Bill Turpin, the editor of the defendant newspaper indicating it is the policy of the newspaper to take a notice under the **Defamation Act** very seriously and if a timely notice had been received the complaints could have been reviewed and any errors or omissions corrected and subsequent stories reviewed with counsel before publication. As well, if a contested article was defamatory an apology would have been published.

[26] His affidavit states that though articles published are only available on the internet site on the day of publication there was an archive site which made available earlier articles. This archive only existed in 1997 to some time in 1998.

[27] The defendant Donham, a columnist for the Daily News for over 10 years was cross-examined, relating to his notes, documents and sources of information which related to his articles. Essentially his evidence was that he discussed the matters for his articles with a number of lawyers who represented claimants, with claimants and others who reported they had suffered abuse, and with some government employees

and politicians. As well he reviewed many documents, from lawyers' files, from court files, from the Stratton Inquiry and some from what he described as a cache of documents known as RG72 (Research Group 72) to which only limited access was available to some people. The thrust of the cross-examination was to determine if the information he used and the sources of that information were still available. Donham's response was certainly some of the information still was although he was uncertain as to how much or its location but the major problem was to determine which parts he relied upon in his writings. As to the people he interviewed, many are still available though many of those who claimed to be abused are not and even naming them would be difficult.

[28] He emphasized that he was not reporting but rather as a columnist was editorializing. As well he indicated that he received no complaints on his involvement in the series and emphasized that his address, phone numbers, fax and E-mail address were openly published and, though his answering machine is always on, he received no messages from any of the plaintiffs, particularly the plaintiff Keating.

[29] David Rodenhiser was similarly cross-examined. He is a reporter with the defendant newspaper, employed as such since 1989. He confirmed that many of the people he contacted are still around but there are many more that he would not remember nor would he be able to recall from reading his articles. Some were former residents of the Centre and some were guards and personnel at Waterville. Those who were lawyers, politicians, government employees and union leaders were more easily remembered and are likely still available. He taped all his interviews but those interviews are lost as the tapes are continuously reused.

[30] That concluded the evidence. There is no doubt that evidence is admissible in a hearing concerning the enforcement or extension of time limits.

[31] Before dealing with the statute of limitations it is important to consider certain provisions of the **Defamation Act** and, of course, an underlying principle is the freedom of the press guaranteed as one of the fundamental freedoms set forth in Article 2 of the **Canadian Charter of Rights and Freedoms**. That principle gives very wide latitude to a newspaper as to what it can print and, whether one appreciates or is disturbed by what is published, the right to a free press must be vigorously defended in a democratic society. One significant limit on this freedom, however, is

that imposed by the laws of defamation. A newspaper cannot defame a person with impunity.

[32] However, in the case of an alleged defamation there are special provisions in the **Defamation Act**, **supra** relating to a newspaper.

[33] Section 18(1) provides:

> "No action shall lie 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 seven . . . days notice in writing of his intention to bring action, specifying the defamatory matter complained of." (underlining added)

and Section 19:

> "Notwithstanding the **Limitation of Actions Act**, an action . . . for defamation . . . shall be commenced within six months after the publication of the defamatory matter has come to the notice or knowledge of the person defamed, . . ." (underlining added)

[34] Section 21 provides for the publication of a full and fair retraction and a full apology to be proved in mitigation of damages but the retraction and apology must be made before the commencement of the action or at the earliest opportunity afterwards.

[35] Section 22 provides that only special damages are recoverable in certain situations where a full and fair retraction and apology were published, one exclusion being where the publication imputes to the plaintiff the commission of a criminal offence.

[36] Clearly these provisions were enacted to permit only timely action by a person claiming to be defamed by a newspaper publication not only to cause a plaintiff alleging defamation to strike while the iron is hot so to speak, but also to permit the newspaper to review its articles and sources but to assess the complaint in a timely fashion so as to determine its reaction to the complaint, and, if it so decides, to issue a full and fair retraction and apology. As well, it is undoubtedly directed to enabling the newspaper to prepare a defence to a claim when the sources of the information, including people interviewed, informants, notes, tapes and other materials are still available and the subject matter is fresh. It is obvious that masses of information are fed into the input side of a daily newspaper to support what is actually published and equally obvious that there is little archival space to retain this information for lengthy periods.

[37] All in all it is apparent that these provisions create a special situation for newspaper publishers, limiting liability claims as well as damages yet providing mechanism for action, both legal and to obtain an apology, when a person claims to be defamed by a particular article published.

[38] They recognize that a defamation is a personal insult involving loss of reputation and esteem and other injury in a community and that the injury is immediate, upon publication, and provide a fair window of opportunity for the person claiming to be defamed to deal with the matter as he sees fit up to and including commencement of legal action. At the same time it acknowledges the freedom of the press by requiring timely notification of a defamation complaint for, to allow claims of this nature to exist for long periods of time such as for tort or contract claims without notification or commencement of legal proceedings would not only deprive a newspaper publisher of a full and fair defence but it would impose an unreasonable burden on its record keeping and on the memories of its writers and leave the publisher open to any number of unknown claimants with possible large damage claims without any ability to mitigate against such damages. To my mind such a situation would be most destructive to the operation of a daily newspaper and inconsistent with the principle of the freedom of the press. The Act, in effect, creates

a reasonable balance between the interests of the press and those of a person alleging defamation.

[39] The requirement of notice has been considered in a number of cases and the underlying reasons for such notice have been consistently referred to. In **Frisina v. Southam** (1981), 124 D.L.R. (3d) 340, Robins, J.A. at para. 12 states:

> "Notice is required to be given in order to allow the newspaper time to inquire into the facts and, if desired, to make an apology or explanation or to settle the case without further trouble or expense - a concession wholly due to the necessity of giving the press much license in making public matters of general interest providing a way in which a slip may be corrected without the expense of a libel suit."

and in **Sentinel Review v. Robinson**, [1927] 4 D.L.R. 232 (Ont. S.C.A.D.) at 237 it is further elaborated:

> "The purpose of the notice is to call the attention of the publishers to the alleged libellous matter. When it is received an investigation can be made, and if the publisher deems it appropriate, a correction, retraction or apology can be published. In this way the publisher can avoid or reduce the damages payable for the publication of a libellous statement.
>
> The plaintiff as well may benefit from the notice. A timely correction, retraction or apology can often constitute a better remedy than damages ....
>
> The notice may have beneficial results both for the prospective plaintiff and publisher. It gives the publisher the opportunity to once again review the matter complained of and determine whether a correction, apology or retraction are called for, and if so, to see that they are made within the time limits prescribed by the Act. The benefits a plaintiff receives from a prompt correction, retraction or apology may be far more valuable than an award in damages." (See also **Siddiqui v. CBC** (2000) Carswell Ont. 3517) where the Ontario Court of Appeal affirmed this reasoning).

[40] The Statement of Claim in this matter sets out the passages of the series of articles which it alleges are defamatory. While the evidence indicates there were many articles in the series only seventeen are referred to and the dates of publication are as follows:

April 10, 21, 25, 27, 28
May 6, 15
July 19, 20
September 9
October 12
all in 1997; and
January 17 (2 articles), 1998; and
January 20, 24
November 21
in 1999.

[41] There is one further article referred to which is entitled "Operation Hope", an article by David Rodenhiser, undated in the Statement of Claim but appears to be either in 1997 or January, 1999 as it was clear from the briefs filed that except for the November 21, 1999 article the January 24, 1999 article was the last complained of.

[42] The Notice of Intended Action in this case is dated June 14, 2000, filed with the Court on June 15 and served on the registered agent for the defendant Southam

the same day. As counsel for the defendant Southam he also accepted service on behalf of the defendant Donham.

[43] Looking at the dates of publication which is admitted to be the dates that each article came to the attention of each of the plaintiffs, the 3 month notice period had expired by from 35 to 26 months for the 1997 articles, 26 months for the January, 1998 articles, 14 months for the January, 1999 articles, and 4 months for the November, 1999 article.

[44] The action herein was commenced on August 25, 2000, with virtually the same periods from the 6 month limitation period set forth in the **Defamation Act**.

[45] Were it not for Section 3 of **Limitation of Actions Act**, R.S.N.S. 1989 c. 258, as amended both the notice and the action being out of time would end the matter.

[46] Section 3 of that Act provides, in part:

> **Interpretation of Section**
>
> 3(1) In this Section,
>
> > (a) "action" means an action of a type mentioned in subsection (1) of Section 2:

(b) “notice” means a notice which is required before the commencement of an action;

(c) “time limitation” means a limitation for either commencing an action or giving a notice pursuant to

(i) the provisions of Section 2,

(ii) the provisions of any enactment other than this Act,

(iii) the provisions of an agreement or contract.

Application to proceed despite limitation period

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

Application to terminate right of action

Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

Factors considered

In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

(a) the length of and the reasons for the delay on the part of the plaintiff;

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;

> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiffs cause of action against the defendant;
>
> (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

[47] The Act contains an absolute limitation of four years after the original limitation expires within which all of the articles complained of would fall.

[48] At the outset counsel for the defence admitted that I was bound by the case of **MacIntyre v. Canadian Broadcasting Corp**., 70 N.S.R. (2d) 129 which held that Section 3 (then Section 2A(2) of the Statute of Limitations applied to the limitation periods of the **Defamation Act**, affirming the earlier Chambers decision of myself in the same case.

[49] Being so bound, I must now consider the provisions of Section 3 as they apply to this case. Basically the section allows the Court to extend the time limits or

disallow a defence based upon the time limits if it is equitable to do so or, as in the case here, to terminate an action where it is not equitable to allow to proceed (Sec. 3(3)).

[50] Section 3(3) sets out a number of factors to be taken into consideration and I shall deal with each one in order.

(a) the length and reasons for the delay on the part of the plaintiff

The delay for the 1997, 1998 and early 1999 publications is inordinate ranging from just short of three years for the first publications complained of to 14 months for the last before any Notice of Intended Action was filed. While the delay for the last article complained of was 4 months, that article was one of a whole series which each of the plaintiffs was fully aware and, in view of the attitude to all of these articles expressed by all the plaintiffs in their evidence it is unreasonable to accept that this delay, though not as long as the others, was not also inordinate.

No adequate reasons for the delay were given in the evidence by the plaintiffs. One suggestion that they could not obtain a lawyer to represent them or take their case

is totally without merit in the circumstances here. I shall deal with legal advice and disability under the appropriate heading of the Act.

(b) any information or notice given by the defendants to the plaintiff respecting the time limitation.

This is not applicable here.

(c) the extent to which, having regard to the delay, the evidence to be adduced by the plaintiff or defendant is or is likely to be less cogent than if the action had been brought (or notice given) within the time limits.

There would be no problem for the plaintiffs under this factor but I am satisfied on the evidence presented that the evidence of the defendants would certainly be less cogent and the defendants would be at a considerable disadvantage because of the time delay.

(d) the conduct of the defendants after the cause of action arose.

This factor has no application here.

(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action.

This factor requires the Court to look at a disability which arose, in this case, after the publication or publications complained of, to determine if such disability alleged was of such a nature as to prevent a person from acting during the limitation period.

The evidence is that neither of the plaintiffs Keating and MacKenzie allege any disability while the plaintiff Butler's mental and emotional problems began before the impugned articles appeared and, given the articles may have caused him further stress, his affidavit evidence and cross-examination clearly show that he was not under the type of disability contemplated here. He stated that he was under medical care and between 1995 and 1998 his mental state was such that he was in no condition to contemplate any legal action (with the implication that he could from 1998 onward) but during the same period he wrote "countless letters to various politicians, civil servants, union representatives and others in an attempt to exonerate myself . . .". As well he consulted four lawyers regarding both the articles and his

attempts to prove other allegations against him were untrue. Throughout the whole time involved here he managed his affairs and performed one's usual daily activities.

The plaintiff Hemeon suffered from depression and stress leading to his going on long term disability. His affidavit states that "on many occasions I thought about taking legal action against the Daily News and Parker Barss Donham . . . but I did not have the emotional strength to bring action on my own". On cross-examination, however, he also performed his daily activities, managed his affairs with the help of his wife, attended meetings of the group and understood what was going on and the advices received. Again, I cannot conclude that a true disability as contemplated by the Act existed here.

The plaintiff Muinonen suffered from anxiety related symptoms, allegedly caused by the articles, during 1997 but was substantially recovered by the summer of 1998, after which he participated in the group meetings, fully understanding what was going on and the advices received. He also sought legal advice in 1997 regarding one article and was advised there was nothing he could do. He, as well, managed and conducted his affairs throughout the whole period involved

here. Again, there is insufficient evidence to establish that the plaintiff was under any disability of the nature contemplated by the Act.

(f) the extent to which the plaintiffs acted promptly and reasonably once they knew whether or not ... (the publications) might be capable at that time of giving rise to an action for damages.

Nothing in the evidence shows any prompt or reasonable acts when these articles were published. Each of the plaintiffs felt wronged from the first publications, discussed them regularly and received legal advices but took no acts towards the defendants to further any possible claim.

(g) the steps, if any, taken by the plaintiffs to obtain medical, legal or other expert advice and the nature of any such advice they may have received.

Here is the most fatal factor for these plaintiffs. The evidence is clear that each was aware of the publications on the day each was published.

[51] They were meeting together weekly and, among other things discussed these articles. They felt defamed and sought legal advice, not once, but on a number of occasions from Cameron MacKinnon, a lawyer whose advice ranged from "it is not worthwhile to proceed" to "received little encouragement" (Keating evidence); "none (lawyers) had indicated a willingness to take the case" (MacKenzie evidence); after consulting four lawyers "I did not receive from these lawyers any advice or assurances that such a suit was a practical undertaking" (Butler's evidence); "on many occasions I thought about taking legal action" (Hemeon evidence); "was advised there was nothing I could to" (Muinonen evidence).

[52] Clearly each plaintiff accepted the advice given and failed to proceed to any action within the time limits. There is nothing in the evidence to indicate whether the plaintiffs were or were not informed of time limits but that is irrelevant here as they clearly took the advices given and did not proceed further.

[53] Keating testified that their present counsel was retained by the group, Past Employees for Restorative Justice, in 1998. Yet it was only in the Spring of 2000 that the plaintiffs were advised they had a basis of a suit for defamation and only when as a group that the plaintiffs gave notice.

[54] In my opinion the remedial sections of the **Limitations of Actions Act** were never intended to overcome time limit prohibitions in a situation such as this. There are no equities under any of these factors which fall in the plaintiffs favour in the circumstances here.

[55] As a result the application to strike the Notice of Intended Action and the Originating Notice (Action) as being out of time pursuant to Sections 18 and 19 of the **Defamation Act** is granted and both are struck. Since the **Limitation of Actions Act** was vigorously argued by both parties and to that extent and for purposes of clarity, the plaintiffs' right of action is terminated pursuant to Section 3(3) of that Act and if this hearing was construed to be an application for relief from the time limits that is denied.

I should add, for completeness, that archival material contained on the Internet does not amount to a continual publication nor does it alter the date of publication for the time limitation periods.

Statement of Claim

[56] The second part of this application relates to the Statement of Claim which, the defendants assert should be struck as not disclosing a cause of action "in that the words complained of are not capable of referring to the plaintiffs.

[57] Having determined the action fails it is not necessary to deal with this matter but, in order to respond to the application I propose to do so.

[58] In this type of application the law is clear that no evidence is admissible and the Statement of Claim is read and accepted as true.

[59] In *Canadian Libel Practice* by Porter and Potts the function of the trial judge (i.e. in this case, the judge hearing the application) is set forth at paragraph 492 as follows:

> "**492. Functions of the trial judge.** It is for the trial judge to determine as a question of law whether the words used are capable of being defamatory in the sense that a reasonable man could construe them unfavourably in such a sense as to make some imputation on the person complaining."

and at p.128:

> "The plaintiff must prove that the words were reasonably understood to refer to the plaintiff. Duties of the trial judge: The trial judge must determine whether there is any

> evidence to be submitted to the jury that the words complained of would be understood by reasonable persons to refer to the plaintiff."

[60] Gatley, on *Libel and Slander*, 9th ed. provides at p. 860:

> "It is a question of law for the judge whether there is any evidence to be submitted to the jury that the words complained of would be understood by reasonable persons to refer to the plaintiff."

and at p. 161,

> "To succeed in an action of defamation the plaintiff must not only prove that the defendant published the words and that they are defamatory: he must also identify himself as the person defamed. 'No writing whatsoever is to be esteemed a libel unless it reflects upon some particular person.' 'It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'."

[61] Brown, *Law of Defamation* at 6-2 and 6-28 provides the test where a class of persons is referred to in the alleged defamatory articles as follows:

> "Defamatory remarks directed against a class of persons may be defamatory of a particular individual but only if the statement can be reasonably understood to single him or her out." and,
>
> "Where the defamatory words are published about a class of persons or organization to which the plaintiff belongs, the latter must show that the words are directed at him or her as an individual. The plaintiff must show that the publication is of and concerning him or her personally."

[62] In applying these tests in any given case it is only reasonable to say that it is not enough to say that by some person the words might be understood in a defamatory sense. Where there are a number of good interpretations it is unreasonable to seize upon the only bad one to give a defamatory sense to the words in question.

[63] As MacDonald, A.C.J. stated in a most recent decision in **Keating v. Southam Inc.**, S.H. 153984C, at p. 6:

> ". . . I must ask myself, 'Could a reasonably informed reader find these excerpts defamatory of the Plaintiff either on their own or by innuendo?'" See **Elliott et al. v. Canadian Broadcasting Corp. et al.** (1993), 108 D.L.R. (4th) 385 [Ontario Court (General Division)] at pages 539 and 540.

[64] Taking this approach I must now deal with each allegation in the Statement of Claim. It is unnecessary to set forth each article here as all are contained in 15 pages of the Statement of Claim and my reference to each will only be in summary form. I must indicate that while only excerpts from some articles were referred to, I am entitled to consider the whole article and in each case I have done so. I propose to follow the same order in the Statement of Claim.

(a) Article April 20, 1997 entitled "they Were Children Once"

In essence this article is referring to the damaged lives of abuse victims. The only passages of this article that refer to anyone are "bureaucratic indifference" and "government officials of the day ignored or failed to follow up adequately on reports of abuse." Nothing specifically refers to the plaintiffs.

No reasonably informed reader could find these excerpts defamatory of the plaintiffs and this allegation of defamation must be struck.

(b) Article April 21, 1997 entitled "Monday Profile, Bullying the Bullies"

This is an article about William Leahey, a lawyer, who acted in an abuse matter at a Truro institution and refers to his intentions regarding certain male clients claiming abuse at Shelburne. The impugned passage is a quote from Leahey stating there was "an atmosphere of toleration of pedophilia by male guards toward the female children" and "But as far as I'm concerned the people who protected (the pedophiles) are worse by far."

Again, no reasonable informed reader could consider this passage defamatory of the plaintiffs. The article clearly refers to another institution. This allegation should be struck.

(c) Article April 25, 1997 entitled "Sex Abuse Noted as Recently as 1995"

This article is a reporting of the contents of a report to the Minister of Justice indicating that "Young offenders are victims of abuse

while in custody at both the Shelburne and Waterville Centres"; that "a certain percentage of staff at both institutions were aware of the victims of abuse" and finally "abuse has occurred in the past with no consequences and with the present leadership will likely continue".

As before, no reasonable informed person would consider this passage defamatory to the plaintiffs nor to those plaintiffs occupying supervisory positions. The words "present leadership" do not suggest directly or by innuendo the plaintiff Muinonen or any other plaintiff in a supervisory position. This allegation should be struck.

(d) Article April 27, 1997 entitled "A Classic Case of Obedience Over Conscience".

This commentary related to the questions of how so many child molesters were drawn to these institutions and why no one who got wind of any abuse was "reluctant to rock the boat". The article states "Many of the officials who turned a blind eye to reports of abuse, or failed shamefully to follow up on clear cut evidence of criminal assaults are respected, even honoured, members of helping professions" and quotes from comments of another lawyer, Ed Dunsworth, who represented some

victims from Shelburne and the Truro School for Girls, including "When somebody screws up, everybody closes ranks".

This allegations must be struck also as no reasonably informed reader would consider these words as referring to the plaintiffs in any defamatory sense.

(e) Article April 28, 1997 entitled "the Worst of All Worlds"

This article suggests the government should institute a full public inquiry to look into the vast number of alleged abuse victims, quoting a number of lawyers acting for victims. The impugned passages are quotations, again of William Leahey, "In fact, what we are trying to show is that this is about people in authority - very significant, very important people in the government - knowing that children were being abused in these schools and allowing it to happen for decades. Not only allowing it to happen, but taking active steps to cover it up", and "What about the people who knew about this, allowed it to continue, and did nothing to stop it."

Applying the reasonably informed reader test again, this article must be struck. It could not possibly be interpreted as referring to the plaintiffs or any of them.

(f) Article May 6, 1997 entitled "Survivor Urges United Front"

This article is about one person who claimed to be abused, relating his story. The impugned passages are quotations by this person, including "There was rape and physical abuse then . . .", and "There's people who did this sitting with pensions. Their communities don't know. Their families don't know", and "It (Shelburne) was just a place for the government pedophiles to work".

A true and fair construction of the article, which referred to and named two abusers, one of whom was convicted for abuse offences and the other committed suicide at or about the time he was being investigated, could not lead anyone to infer that all employees at Shelburne are or were pedophiles. This article is not capable of being defamatory of the plaintiffs and must be struck.

(g) Article May 25, 1997 entitled "The Short Life of Ricky Alberry"

This is an article about a young boy of 13 years who allegedly committed suicide in 1972 while at the Shelburne School for Boys but whose mother thinks perhaps there are other reasons for his death. The impugned passage is "In its least damaging interpretation, Ricky's death implies the conditions at the Shelburne School were sufficiently abhorrent to convince a 13 year old boy to kill himself. Any other interpretation would suggest Ricky met with foul play and the truth about his demise has been covered up".

This allegation also must be struck as applying the required test no reasonably informed reader could say this passage is defamatory of the plaintiffs or any of them.

(h) Article July 19, 1997 entitled "Political Interference allowed "tragedy" at Youth Centres to Continue, Lawyer Says"

This article was directed to allegations of political interference, and documentary evidence becoming available. The impugned passages here are: "Halifax Lawyer Bill Leahey says he has evidence that political interference allowed beatings, molestations and rapes to continue in Nova Scotia youth centres for decades"; and " . . . why the province

placed kids in the hands of pedophiles and sadists"; and "the evidence . . . substantially validates the theory of the case for the plaintiff, which is there was official condonation and protection offered to those men who were pedophiles, over a period of decades".

From this it would be difficult to determine what group of people is being referred to let alone that it could be the plaintiffs and no reasonably informed person could find that there were defamatory words here directed at any or all of these plaintiffs. So this allegation is struck.

(i) Article July 20, 1997 entitled "an Open Letter to Premier Russel McLellan".

This article suggested massive abuse for over 50 years with "hundreds upon hundreds of boys and girls" suffering this abuse while in the care and custody of the provincial government. It suggests the scope of the abuse is staggering and its magnitude suggests the word "systemic" can be applied. The impugned passages, which include the foregoing generalities, and with the following: "again and again, officials faced with such knowledge chose to protect, not the helpless children who suffered this abuse, but their tormentors".

Again, nothing could be reasonably inferred to conclude these remarks as being directed against the plaintiffs or capable of being defamatory to them. This allegation must be struck.

(j) Article September 9, 1997 entitled "Don't Stop at the official line".

This was an article criticizing the government approach to resolving the issue of compensation. The impugned passages here relate to "government coverup of official involvement in the residential schools abuse scandal"; "The RCMP . . . are preparing to lay charges against hundreds of current and former government officials"; and, referring to one child "his punishment was months of physical and sexual assaults in reform school".

Nothing in these passages in any way can be said to point out any of the plaintiffs here. This allegation must be struck.

(k) Article October 12, 1997 entitled "RG72 the Bat and the Big Lie"

This article was a criticism of the government relating to a large cache of documents (RG72) and included comments of William Leahey.

The impugned portions include "if these documents come to the light of day its not going to serve any of the people who were in charge . . . everyone of those people stand at risk of being charged with criminal negligence causing bodily harm"; and "When . . . you bring the absolute truth out, . . . people are going to go to jail - big shots - judges, ministers, ex-ministers, deputy ministers, they are all going to get charged".

Clearly, these passages are directed to persons very different from the plaintiffs and no reasonably informed person could believe that these references single out the plaintiffs or any of them. This allegation must be struck.

(l) Article January 17, 1998 entitled "Suicides Likely to Continue"

This article was about a number of suicides of former inmates and staff of the Shelburne school and criticized the government for its approach to the abuse situation. The impugned passage is "It has to be recognized for what it was: gross, evil and it has to be stamped out. Every person who came in contact with this tragedy did not emerge from it without being injured in some way and that includes superintendents,

the supervisors, the people up the ladder who were responsible for administering the law". (another quotation of Leahey).

I am satisfied that the excerpt in the context of the whole article is not capable of being found defamatory of the plaintiffs. It does not refer to all occupants of those positions and no reasonably informed person could find any singling out of the plaintiffs or any of them. This allegation must be struck.

(m) Article January 17, 1998 "Compensation Review One Sided"

This was a critical article about an investigation into provincial reform school abuse. The impugned passages include, "The result is a harmful report that has already encouraged those who demean, dismiss and stigmatize claimants whose childhoods were defiled by government sponsored abuse"; and "as if government employed child molesters left detailed notes of their exploits on reform school logs"; and "boys as young as 11 years old . . . were incarcerated, under guard at a correction facility where employees of the Nova Scotia government subjected many of them to the most repugnant forms of abuse an adult can visit upon a child."

Obviously this does not refer to any particular persons nor can it be interpreted to refer to all persons involved in the institutions. The appropriate test therefore indicates that the plaintiffs are not singled out, referred to or capable of being believed to be referred to. This allegation must be struck.

(n) Article January 20, 1999 entitled "School Abuse Far From Over, and It's Not Just the Government; the Media Is Joining In Too."

This article referred to and was critical of another article by another writer in the Halifax Chronicle Herald. The impugned passage here is, "Transport a bunch of 10 to 16 year old children, hundreds of miles from home and family, lock them in a reform school, subject them to anal rape, forcible oral sex, routine beatings and sundry molestations, and surprise - some of them grow up to be less than model citizens."

Nothing here could be taken to identify the plaintiffs. This passage must be struck.

(o) Article January 24, 1999 entitled "Chronicle Herald Joins Abuse"

This was another article criticizing the Halifax Chronicle Herald with the impugned passage being "the story of Shelburne, by far the largest abuse scandal in all of Canada - and the massive coverup of the RG72 documents has been a non-story for the local media."

This excerpt cannot be considered to refer to the plaintiffs and this passage must be struck.

(p) Article November 21, 1999 "Fifth Estate Loose With Facts"

This article written by the defendant Donham was critical of a Fifth Estate (CBC) television program, particularly referring to alleged factual errors.

While there are several quotations in the Statement of Claim I am satisfied that the first 3 paragraphs do not single out or refer to the plaintiffs nor could a reasonably informed person so believe. However, the final passage referring to cheap television tactics states "accused guards were shown tending their garden or strolling arm in arm with loved ones along sandy beaches".

This refers explicitly to two of the plaintiffs, Keating and Butler. I would not strike this allegation from those two plaintiffs though nothing in the article could be believed to refer to the other plaintiffs.

(q) Article May 10, 1997 "Operation Hope"

This article refers to the types of abuse that was being dealt with by "Operation Hope" an R.C.M.P. investigation. It mentions no particular institution referring only to "N.S. Youth Facilities" nor does it refer to any staff person or persons. At most it states "most suspects were staff members of the facilities", certainly a phrase that no reasonably informed person wold believe to be referring to the plaintiffs.

The passages in the Statement of Claim make no reference to anyone or to any group from which an inference could be made that there was a reference to any of the plaintiffs. This allegation must be struck.

[65] Generally speaking, I am aware of the law and authorities supporting a defamation suit by an individual member of a group or class when the impugned

words refer to all members of the group or class. I have found none of the impugned passages to fit into this category.

[66] In summary, therefore, all allegations of defamation of the plaintiffs or any of them are struck with the exception of paragraph (p) and then only regarding the plaintiffs Keating and Butler.

Negligence Claim

[67] The defendants' application includes a request to strike this claim as not disclosing a cause of action. The Statement of Claim in paragraph 18 alleges a breach of a duty of care relating to the articles and in paragraph 19 claims negligence.

[68] The essential issue is whether a defamation action can somehow be transformed into a negligence action.

[69] The plaintiffs contend such can be the case citing **Spring v. Guardian Insurance** (1994), H.L.J. No. 31, an English House of Lords decision in support. That case involved a defamatory reference about a person in response to a request from a business where that person was seeking employment. It was really the

proximity between the plaintiff and the defendant, former employee and employer that caused the court to uphold a negligence action, in effect separating the negligence from the defamation although the defamatory remarks were essential to finding a breach of a duty of care. The duty of care, however, arose from the closeness of the relationship of the parties. That is very different from the present case. The **Spring** case does not establish the principle that every or any defamatory claim automatically gives rise to a negligence action. There the court was dealing with a plaintiff who suffered real economic loss by the defamatory words of his former employer and the court found that it would be unjust, in the circumstances, for the plaintiff who would otherwise be entitled to succeed in an action for negligence to go away empty-handed because he could not succeed in an action for defamation.

[70] The duty of care in that case does not exist in the present case. There is no close relationship between the plaintiffs and the defendants here. There was never a contractual relationship between them as in **Spring**. In my opinion the **Spring** case does not extend as the plaintiffs suggest.

[72] In the present case the essential claims are for loss of reputation, with the effects going to damages. For the reasons outlined earlier there are restrictions, and

protections and defences all associated with a claim of defamation. To permit defamation claims to automatically be transformed to negligence claims would remove all those from any effect whatsoever; the limitation periods would be gone and the opportunity to retract or apologize would be gone as would the mitigation provisions. In effect there would be no need for and no effect given to the main provisions of the **Defamation Act** itself and this would result in a major intrusion upon the freedom of the press and free speech.

[73] In **Elliott v. Canadian Broadcasting Corporation** (1993), 16 O.R. (3d) Montgomery, J. struck a paragraph of the statement of claim alleging failure to adequately research in this passage:

> "The statement of claim alleges failure of the defendants to adequately research the records. The defendants could be negligent in their research if they did not publish. What the plaintiffs complain of is the harm alleged from the publication of that negligently researched material. The grievance of the plaintiffs is injury to reputation. That is really a claim in defamation, not in negligence. The negligent research is not actionable per se.
>
> This further disguised claim of defamation must be struck."

[74] And in **Lulton v. Globe and Mail** (1997), 152 D.L.R. 377, there also was a claim for negligence similar to the present matter. There, at paragraphs 6-9 Belzil, J. said:

> "The law has long recognized that the law of defamation is unique in that it has been developed in the context of the balancing of the interests of maintaining free speech and the right of persons not to have their reputations unfairly sullied.
>
> The law has also recognized that defamation and negligence are distinct areas of the law, and attempts to merge the two or attempts at disguising defamation claims under the guise of claims in negligence have been resisted by the Courts.
>
> In the 1941 decision of Foaminal Laboratories, Ltd. v. British Artid Plastics, Ltd., [1941] 2 All E.R. 393 (K.B.), this classical statement of the law appears at p. 399:
>
> > . . . a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action, subject to certain recognized exceptions . . . [page 380]
>
> The recognized exceptions are as follows:
>
> > a. against a banker for refusing to honour a customer's cheque in circumstances where the customer had funds to meet the obligation;
> >
> > b. for breach of promise of marriage;
> >
> > c. where a vendor of real estate, without any fault on his part, failed to take title, and
> >
> > d. for breach of contract to permit an actress to play a role in a play when such had been advertised to the public."

[75] It may very well be that the House of Lords in **Spring** may have created another exception, to do justice in that case, however, I am satisfied that, in Canada, and at least for newspaper articles the general approach is that defamation and negligence are two distinct areas of the law and any attempt to merge the two, for obvious reasons of policy, must be resisted.

[76] Nothing in the present case would suggest any departure from this approach. The claim for negligence, being a disguised defamation claim, must be struck.

[77] In conclusion the applications of the defendants are, therefore, granted save for the one retained allegation in the Statement of Claim. The defendants are also entitled to costs.

J.