

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Carter v. B.C. Federation
of Foster Parents Assn.***,
2005 BCCA 398

Date: 20050803
Docket: CA031644

Between:

Liza Carter

Appellant
(Plaintiff)

And

**B.C. Federation of Foster Parents Association, Kim Dupont, Penny Seguin,
Bill Reid, Pauline Reid, Heather Murphy, Stephen Hakes, Glenn LaFrance,
Audrey Anger, Kay Dahl, John Humphrey, Karen Humphrey, Blue Frogg
Enterprises Inc., John Doe, Jane Doe, Robert Doe, Richard Doe and Mary Doe**

Respondents
(Defendants)

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Hall
The Honourable Madam Justice Saunders

C.G. Fletcher and
M. Katerberg

Counsel for the Appellant

D. McKnight

Counsel for the Respondent
B.C. Federation of
Foster Parents Assn.

Place and Date of Hearing:

Vancouver, British Columbia
7 June 2005

Place and Date of Judgment:

Vancouver, British Columbia
3 August 2005

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This is an appeal from the order of Mr. Justice Taylor pronounced 2 February 2004 dismissing the defamation action of the plaintiff appellant against one of the defendants, the B.C. Federation of Foster Parents Association (the "Federation"). The respondent Federation is a society registered under the **Society Act**, R.S.B.C. 1996, c. 433. Its purpose is to bring together foster parents, social workers and other interested people to improve the standard of care for foster children in B.C. The appellant Liza Carter has been involved with the Federation since the early 1990s. Initially, she was elected as a regional representative for the Prince George region. For a short time in early 1998 she held the office of president of the Federation and from May 1998 to May 2000 she remained on the board of directors as past president. In May of 2000 the appellant ran for the office of and was elected president of the Federation and she held this position until May 2002.

[2] A group of individual defendants including the defendant Kim Dupont comprises the B.C. Foster Care Support Network (the "Network"). This Network was apparently created in early 1996 by the defendant Dupont.

[3] Central to this appeal are two internet "forums" or "chat rooms". The parties used the terms interchangeably to refer to internet locations where electronic discussions take place. What I shall term the "Federation Forum" was set up in 2000 to provide foster parents with an opportunity to discuss foster parenting issues. That same year another forum, referred to as the "Bopeep Forum", was created. That forum appears to have some links to the Network aforesaid. Both of these

forums were stored on the web server of an internet service provider known as Blue Frogg, which carried on business as Delphi Forums.

[4] It is common ground that the Bopeep Forum contained a considerable amount of scurrilous material defamatory of the appellant Carter. The Network at times material to this action published a newsletter which was received by, amongst others, the defendant Federation. Contained in the issues of the Network newsletter was an internet address for the Bopeep Forum and a statement that readers could check out this forum "for more news" at that address. Staff of the Federation, at the direction of the board of directors, distributed this newsletter to individual board members. It was apparently the practice of the Network to widely distribute its newsletter to media outlets and government agencies such as the Ministry of Children and Families.

[5] In February of 2000, a person using the online identity "Dberlane" posted a comment on the Federation Forum concerning the appellant Carter that, although not nearly as scurrilous as some of the comments found on the Bopeep Forum, was arguably defamatory of the appellant Carter. The appellant Carter became aware of this comment and urged the board of directors of the Federation to shut down the forum because it was being misused. The host of the forum was a person by the name of Ospina. A board member charged with responsibility for the Federation Forum, Mr. Mynott, deposed that he had requested that Ms. Ospina contact the internet service provider in May 2000 to have the forum temporarily closed and he deposed that he also requested that Ospina should review materials on it with the instructions to leave education materials on the forum site and remove other

materials. He did not follow this up to see that the direction had been carried out. While it appears that the forum was reconstituted as a "read only" site in the spring of 2000, the offending comment was not removed and remained on the forum. In the spring of 2002, the appellant Carter discovered that the offensive comment remained on the Federation Forum. The evidence is sparse as to whether or not anyone accessed this comment on the forum site between 2000 and 2002.

[6] The appellant commenced a defamation action against the individuals comprising the Network, and as well sued the Federation alleging that it was responsible for republishing the defamatory comments in the Bopeep Forum by disseminating the Network newsletter with its reference to the internet address of the Bopeep Forum. Later, in 2002, after she discovered that the Dberlane comment remained on the Federation Forum, Ms. Carter amended her claim to include this alleged instance of defamation by the Federation. Eventually, the Federation closed its forum in December 2002. It appears that the directors of the Federation including Mr. Mynott were of the opinion that the offensive material had been removed from the Federation Forum as of the year 2000 but became aware that this was not so when they received notice of the amended statement of claim of the appellant in May of 2002. Following this, they took steps to have the forum site closed but apparently encountered some difficulty in achieving this in a timely way.

[7] Although the appellant now appears to complain that there was not sufficient material before the trial judge to decide this matter under the provisions of Rule 18A, this may not have been made very clear to the trial judge, particularly so because there was a cross application before the judge on behalf of the appellant seeking a

declaration that the Federation had republished statements made in the Bopeep Forum and that it had published defamatory words in its own forum, the aforementioned Dberlane comment, concerning the appellant. The trial judge decided the Rule 18A application in favour of the respondent, the defendant Federation, and dismissed the claims of defamation brought against the Federation by the appellant. The appellant argues here that the judge erred in so ruling.

[8] The judge found that by merely disseminating the Network newsletter, which the appellant admits did not contain any material specifically defamatory of the appellant but which merely contained a reference to the Bopeep Forum on which could be found the defamatory material, the defendant did not publish the defamatory material. In the course of his reasons, the judge noted this as the basis for the claim advanced against the Federation regarding the Bopeep material (at para. 35):

On March 12, 2002, the plaintiff's solicitor, responding to a demand for particulars set forth the plaintiff's claims against the Federation as follows:

Re: Carter v. BCFFPA et al.

In further answer to your demand for particulars, and further to our telephone conversation of March 12, 2002, you may rely on our representation that the complaint against your client is that your client forwarded letters to its members, which letters were prepared by the Network, and which letters contained the address of the forum. To the best of our knowledge, none of those letters which were forwarded contained comments which, in themselves, were defamatory. Of course, if such should surface during discovery of your client, our pleadings and our position might well then change.

[9] In holding that the Federation ought not to be found liable for the material found on the Bopeep Forum the judge said this at paras. 51-59:

On the evidence before me, there is nothing in the network newsletter to suggest a defamatory comment if a reader of the network newsletter did no more than read the newsletter. In order to read the alleged defamatory comments, it was necessary to go to the Bopeep Forum. The address of the Bopeep Forum was listed in the Network newsletter. This comment was contained among a myriad of other unobjectionable comments posted on that site (i.e. the Bopeep Forum).

The law has held liable those who perpetuate defamatory comments by permitting such comments to remain at premises controlled by them even though they did not author or authorize the original publication. See *Byrne v. Deane*, [1937] 2 All E.R. 204, *Hellar v. Bianco*, 111 Cal. App. 2d 424 (Cal. 1952), *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir.1987).

Additionally, liability has been found where a defendant wilfully directed others to defamatory statements when he neither authored nor authorized their publication on premises not controlled by him. See *Hird v. Wood* (1894), 38 S.J. 234 (C.A).

Common to each of these two lines of authorities is that the defendant had knowledge of the defamatory words and it lay within his power to remove the offending words and he failed to do so or he directed others to the words.

It is argued by the plaintiff that merely informing others in the context of forwarding a newsletter that makes reference to a website without reference or knowledge of its contents constitutes the publication of the defamatory words contained within the Bopeep Forum which was at the referred website.

Some analogous assistance may be found in cases where reference was made to a magazine article that contains the defamatory words without repetition of the article.

In *MacFadden v. Anthony*, 117 N.Y.S. (2d) 520 (Sup.Ct. N.Y. 1952), Eder J. of the New York County Supreme Court held that such reference did not amount to a republication of the libel contained in the magazine article.

Eder J. relied upon an earlier New York Court of Appeal decision in *Klein v. Biben*, 296 N.Y. 638 (N.Y. Ct. App. 1946) that held that the simple mention of an article that contained defamatory

comments without reference to the comments could not amount to a republication of the defamatory comments.

If in such cases such mention of a magazine article could not constitute a republishing of a defamatory comment contained in the article, then what occurred here was even more remote as a reference was made to a website that contained all manner of participants' comments including the Bopeep comment.

[10] The appellant argues, making special reference to the case of **Hird v. Wood** (1894), 38 S.J. 234 (C.A), that the respondent Federation should have been found liable for referring recipients of the Network newsletter to the website where the offensive comments could be found. The **Hird** case concerned an application for a new trial of a libel action. The plaintiff appellant owned a number of cottages in a village and lived in one of the cottages. A new business was set up by boilermakers near to the cottages and the plaintiff obtained an injunction to restrain the carrying on of the business in such a way as to be injurious to his property and as a result the boilermakers' business terminated. Certain individuals in the neighbourhood were displeased by this result and decided to take up a subscription for the persons whose business had been terminated. On a public occasion, a placard was set up containing a notice that subscriptions might be donated to the former owners of the business "who have been ruined in their business and their living taken away by the animosity of one man". I take it from the report of the case that it was common ground that the one man referred to was the plaintiff appellant. Throughout the first trial there was no evidence as to who wrote the words on the placard or who erected it, but it was proven that the defendant took up a position near to the placard and remained there pointing at the placard with his hand and attracted attention of

passers-by to the placard. At the first trial, the presiding judge held that there was no evidence of publication and directed a verdict for the defendant. The Court of Appeal held that there was evidence of publication sufficient to be passed on by a jury and ordered a new trial.

[11] In the course of his reasons, Taylor J. made reference to ***Tacket v. General Motors Corp.***, 836 F.2d 1042 (7th Cir. 1987). In that case, it was held that where a sign defamatory of the plaintiff was left on a plant wall for several months, it was a question of fact for a jury to decide whether or not the defendant employer could be found liable for defamation of the plaintiff employee. Obviously in that case, the employer had control over the plant premises. In the instant case, there is no suggestion that the Federation had any measure of control relative to the Bopeep Forum. Thus the ***Tacket*** case affords little assistance in this case.

[12] In my opinion, the factual situation here is closer to the situation found to exist in the New York cases of ***MacFadden v. Anthony***, 117 N.Y.S.2d 520 (Sup. Ct. 1952) and ***Klein v. Biben***, 296 N.Y. 638 (Ct. App. 1946), referred to by the trial judge, where the courts held reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment.

[13] Unlike the situation found in the ***Tacket*** case, there was here no element of control by the Federation over the Bopeep Forum and the facts of the instant case are quite distinguishable from the situation found to exist in the ***Hird*** case. In ***Hird***, the defendant took active steps to draw the attention of persons to the defamatory

placard. I should say that the defendant there was taking active steps to publish to the world the defamatory material contained on the placard. I do not believe the circumstances extant there can be successfully analogized to the instant case. I take note of the fact that this was a reference in a printed newsletter to a website and I would limit the effect of this case to that factual situation. Whether a different result should obtain concerning an internet website that makes reference to another website I would leave for decision when that factual circumstance arises. In the result, I am not persuaded that the learned trial judge made any error in his assessment of this aspect of the matter and I would dismiss the appeal on this issue concerning the Bopeep Forum.

[14] I turn now to a consideration of the trial judge's decision to dismiss the appellant's action against the Federation based on the Dberlane comment. That comment was found on the forum under the control of the Federation and maintained by the service provider Blue Frogg. The substantial basis relied upon by the trial judge in dismissing this particular claim was that it was out of time. The judge also went on to hold that in any event the publication was innocent and unintentional. The time bar argument based on the expiry of a limitation period was founded upon what is sometimes referred to as the "single publication rule". This appears to be a rule adopted by a number of American states, particularly New York State, but it is not a universal rule.

[15] The single publication rule has not found favour in England: see **Loutchansky v. Times Newspapers Ltd.**, [2002] Q.B. 783 (C.A.). At para. 64 of

that judgment, the Court of Appeal set forth the substance of the single publication rule:

Some time was taken during the appeal in exploring, with the help of American authorities, the nature of the "single publication rule" in the United States. We take the following clear statement of that rule from the judgment of District Judge Holtzoff sitting in the United States District Court for the District of Columbia in *Ogden v Association of the United States Army* (1959) 177 F Supp 498, 502:

"From the foregoing discussion the conclusion is inescapable that the modern American law of libel has adopted the so-called 'single publication' rule; and, therefore, this principle must be deemed a part of the common law of the District of Columbia. In other words, it is the prevailing American doctrine that the publication of a book, periodical or newspaper containing defamatory matter gives rise to but one cause of action for libel, which accrues at the time of the original publication, and that the statute of limitations runs from that date. It is no longer the law that every sale or delivery of a copy of the publication creates a new cause of action."

[16] In the instant case, Taylor J. found that since the appellant knew more than two years prior to the amendment of her statement of claim of the existence of the Dberlane comment, she could not rely on the continued presence of the item on the forum in the spring of 2002 as a foundation for advancing her claim against the Federation. The judge said this at para. 84 of his reasons:

If the plaintiff is correct in terms of a republication occurring each time a user accesses the forum and such a user was able to read the Dberlane comment, quite apart from the myriad of other innocent postings, then a site provider (as opposed to a service provider such as Blue Frogg) such as the Federation could never avail itself of any limitation period defence.

A similar argument was advanced unsuccessfully in the **Loutchansky** case. In **Loutchansky**, the court observed:

66 In *Berezovsky v. Michaels* [1999] EMLR 278 in the Court of Appeal the defendants sought to persuade the court to approach the case as if it involved a single global cause of action to be pursued in whatever jurisdiction was the most appropriate. The single publication rule was invoked by way of analogy. This argument was not advanced in the House of Lords and Lord Steyn observed [2000] 1 WLR 1004, 1012 that it was "contrary to the long established principle in England libel law that each publication is a separate tort". In the present case the defendants do not suggest that the English courts should apply the single publication rule where a libel has been disseminated in more than one jurisdiction. They contend, however, that the rule should be applied when the issue is one of limitation in relation to an action commenced in this jurisdiction.

At para. 76 of *Loutchansky*, the court rejected the defendants' contention that the single publication rule should be used in England:

76 The change in the law of defamation for which the defendants contend is a radical one. In our judgment they have failed to make out their case that such a change is required. The Internet single publication appeal is therefore dismissed.

[17] As well, in an Australian case, *Dow Jones & Company Inc. v. Gutnick*, [2002] HCA 56, the Australian High Court declined an invitation to adopt the single publication rule in Australia. In that case, the argument was not directed at a limitation issue but to a question of the appropriate forum in which to try an action for defamation wherein the plaintiff Gutnick, a resident of the Australian state of Victoria, alleged that he had been libelled in an article published by the American defendant publisher, Dow Jones & Company Inc., who maintained the web servers for its online services (which hosted the defamatory statements) in the United States. The members of the High Court, particularly Kirby J. in a concurring judgment, acknowledged that the advent of the internet had created an entirely new publishing

regime and discussed whether it would be appropriate to adopt new rules in light of this dramatic new development in publishing. Callinan J., in his concurring reasons in that case, pointed out at para. 191 that the appellant publisher acknowledged that in order to succeed it would have to persuade the court that it should depart from a line of authority beginning with the case of **Duke of Brunswick v. Harmer**, [1849] 14 Q.B. 185. He noted that the principle enunciated in **Duke of Brunswick** was also recently referred to with approval by the House of Lords in the case of **Berezovsky v. Michaels**, [2000] 1 W.L.R. 1004 (H.L.). At para. 197, Callinan J. observed, "[e]ach publication under current law gives rise to a separate cause of action. This is entrenched in Australian and English law". The court found that a single publication rule could only be introduced in Australia by statute.

[18] Stated simply, the single publication rule is an American rule of law (adopted in many but not all states) under which several communications to a third party of a defamatory statement are held to be only one publication and the limitation period begins to run from the date of the first such communication: **Firth v. State of New York**, 775 N.E.2d 463 (Ct. App. 2002). Although it is difficult to find an express statement in the Canadian cases about the single publication rule, the clear tendency of the authorities in my view is in favour of the English and Australian position and not in favour of the American position. For instance, in the case of **Lambert v. Roberts Drug Stores Ltd.** (1933), 41 Man. R. 322 (C.A.), Trueman J.A. speaking for the court states at 324:

It is elementary that every sale or delivery of a written or printed copy of a libel is a fresh publication, for which an action lies, unless the defendant can satisfy the jury that he was ignorant of its contents and

had no reason to suspect they were libellous. See *Emmens v. Pottle* (1886) 16 Q.B.D. 354, 55 L.J.Q.B. 51; and *Vizetelly v. Mudie's Select Library* [1900] 2 Q.B. 170, 69 L.J.Q.B. 6456.

(It is to be noted that the English cases he refers to in that passage address the issue of innocent dissemination as opposed to a publication issue.) Similarly, in *Basse v. Toronto Star Newspapers Ltd.* (1983), 44 O.R. (2d) 164 at 165, 4 D.L.R. (4th) 381 (H.C.), Montgomery J. held, "[e]very republication of a libel is a new libel". The Supreme Court of Canada referred to the *Brunswick* case in *McNicholl v. Grandy*, [1931] S.C.R. 696 at 699, [1932] 1 D.L.R. 225, but merely used the case as an example of the low standard required for publication to be found.

[19] There can be a potential injustice if a plaintiff is allowed to mount a series of lawsuits based upon a single article, but the courts have the power using their abuse of process jurisdiction to deal with such a course of action: see *Thomson v. Lambert*, [1938] S.C.R. 253, 2 D.L.R. 545. A similar approach was taken by the English Court of Appeal in the recent case of *Jameel v. Dow Jones & Co. Inc.*, [2005] 2 W.L.R. 1614 (H.L.), where the court said at para. 56:

We do not believe that *Duke of Brunswick v. Harmer*, 14 Q.B. 185 could today have survived an application to strike out for abuse of process. The Duke himself procured the republication to his agent of an article published many years before for the sole purpose of bringing legal proceedings that would not be met by a plea of limitation. If his agent read the article he is unlikely to have thought the Duke much, if any, the worse for it and, to the extent that he did, the Duke brought this on his own head. He acquired a technical cause of action but we would today condemn the entire exercise as an abuse of process.

[20] Ultimately, the question of whether the Commonwealth or American approach is preferable has a considerable element of policy inherent in it. Recently, in **Gilles E. Néron Communication Marketing Inc. v. Chambre des notaries du Québec**, [2004] 3 S.C.R. 95, 2004 SCC 53, a defamation case brought against the CBC by a communications consultant employed by the Chambre des notaries, LeBel J. for the majority remarked on the balancing courts must undertake in defamation actions (at paras. 52 and 54):

Despite its undoubted importance, freedom of expression is not absolute. As this Court noted in *Prud'homme* [**v. Prud'homme**, [2002] 4 S.C.R. 663, 2002 SCC 85], at para. 43, freedom of expression can be limited by the requirements imposed by other people's right to the protection of their reputation. Cory J. observed in *Hill* [**v. Scientology**, [1995] 2 S.C.R. 1130], at para. 108, that reputation, as an aspect of personality, is equally worthy of protection in a democratic society concerned about respect for the individual:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

* * *

In an action for defamation the two fundamental values of freedom of expression and the right to respect for one's reputation must be weighed against each other to find the necessary equilibrium....

[Emphasis of LeBel J.]

If defamatory comments are available in cyberspace to harm the reputation of an individual, it seems appropriate that the individual ought to have a remedy. In the instant case, the offending comment remained available on the internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way. Although, for the reasons noted by the trial judge, legislatures may have to come to grips with publication issues thrown up by the new development of widespread internet publication, to date the issue has not been legislatively addressed and in default of that, I do not consider that it would be appropriate for this Court to adopt the American rule over the rule that seems to be generally accepted throughout the Commonwealth; namely, that each publication of a libel gives a fresh cause of action. I consider that the trial judge fell into error when he held that the action of the plaintiff was out of time because she had not commenced her action within two years of first learning of the existence of the Dberlane comment. If Ms. Carter can establish that there occurred publications of the offending comment subsequent to the first publication in February of 2000, then her cause of action would not be time barred. I would observe that there seems to be some obscurity as to exactly what the evidence does disclose about subsequent publication but I do not consider that the plaintiff should be prevented from seeking to establish, if she can, that there was subsequent publication to others which would found a cause of action.

[21] Taylor J. went on to find that in any event the activity of the defendant respondent amounted to innocent dissemination, but this is a difficult defence to maintain as illustrated by the judgment in ***Vizetelly v. Mudie's Select Library, Limited***, [1900] 2 Q.B. 170 (C.A.). Romer L.J. pointed out in that case at 180 the heavy burden lying upon a defendant to demonstrate that the publication occurred without negligence on his part. On the evidence in this case, it is difficult to see how it can be successfully argued by the defendant Federation that the continuing publication occurred without negligence on its part. Here the Federation did not take effective steps to remove the offending comment and there seems to have been no proper follow up to see that necessary action had been taken. I do not therefore consider it was open on the evidence for the trial judge to conclude that a defence of innocent dissemination could be successfully made out on the state of facts here.

[22] In the result, I would allow the appeal concerning the Dberlane comment and remit that matter for decision to the trial court. As I observed, it may be that the plaintiff will have difficulty in establishing the fact of publication to a third party subsequent to her originally learning about the existence of the comment in the year 2000, but I do not consider that she should be prevented from tendering evidence that there was such publication. I would allow the appeal to that extent.

[23] Concerning the question of costs, it seems to me that in view of the circumstance that there were originally cross applications before the trial judge, and that ultimate success here has been mixed, an appropriate order for costs would be

that both parties should bear their own costs of the Rule 18A proceedings, and in this Court the appellant ought to be entitled to her disbursements.

“The Honourable Mr. Justice Hall”

I Agree:

“The Honourable Madam Justice Prowse”

I Agree:

“The Honourable Madam Justice Saunders”