

THE HIGH COURT

[2024] IEHC 349

Record No. 2018/5903P

BETWEEN

BEN (OTHERWISE BERNARD) GILROY AND VINCENT BYRNE

PLAINTIFFS

-and-

FIONA O'LEARY

DEFENDANT

JUDGMENT of Ms. Justice Hyland delivered on 5 June 2024

Summary

1. This is an application by the plaintiffs to join Google Ireland Limited (“Google”) as a defendant to these proceedings pursuant to Order 15 Rule 4 of the Rules of the Superior Court and/or pursuant to the inherent jurisdiction of the High Court. The proceedings relate to an action for defamation arising out of allegedly defamatory statements made by the defendant in a video (“the Video”) published to the video-sharing platform YouTube (“YouTube”), a service provided by Google.
2. The plaintiffs allege that the Video was first published on 23 June 2018, and that certain statements contained in the Video are defamatory of them insofar as it is suggested that

the plaintiffs promoted the use of Miracle Mineral Solution as a cure for autism, cancer, and AIDS.

3. I have decided to refuse to permit the plaintiffs join Google on the basis that their claim against Google is manifestly time barred under the provisions of s.11(3B) of the Statute of Limitations Act 1957 (the “1957 Act”). This is an exceptional jurisdiction and should only be invoked in limited circumstances. But here, where the plaintiffs plead that the material was published on YouTube on 23 June 2018, where the limitation period for defamation actions is one year, extendable for a maximum of two years, where the notice of motion to join Google was brought at the very earliest on 29 March 2021 (or alternatively on 12 December 2022), and where s.11(3B) identifies the date of accrual of the cause of action for material published through the internet as being the date upon which the material is first capable of being viewed or listened to through that medium, I conclude that the cause of action against Google is manifestly statute barred.
4. The plaintiffs sought to argue for a later date of publication i.e. the date upon which they requested Google to take down the material and it refused. In my view, the specificity of s.11(3B) precludes an argument that the cause of action accrued for the purpose of bringing defamation proceedings on the date there was a refusal to take down material. That is because of the clarity of the section: even if *publication* was deemed to have taken place only after a refusal to remove material, the *cause of action* accrues when the material is first capable of being viewed or listened to on the internet.

Legal Principles applying to Joinder

5. The rules in relation to the joinder of an additional defendant are set out in Order 15 Rule 4 of the Rules of the Superior Courts as follows:

“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. Judgment may be given against one or more of such defendants as may be found to be liable, according to their respective liabilities, without any amendment.”

6. While a court will generally grant an application to join a party to proceedings, the court retains a discretion to refuse to join a party to proceedings where the Statute of Limitations clearly applies. In *Hynes v. Western Health Board* [2006] IEHC 55, Clarke J. discussed case law that he described as lending “*support to two conflicting approaches to the question of joinder of a defendant which may be outside the limitation period*”. Having considered those cases in detail, he concluded that the general proposition that a defendant can be joined in proceedings notwithstanding issues as to the applicability of the Statute is subject to an exception that the court retains a discretion not to join a defendant where the Statute would clearly apply and where the joining of such a defendant would be futile. He concluded as follows:

“I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that that defendant concerned intends to rely upon the statute”.

7. The issue arose again in *O’Connell v Building and Allied Trades Union and Others* [2012] IESC 36. Ultimately the Supreme Court acceded to the application on the basis that the proposed co-defendant had not been on notice of the application and had not filed an affidavit and therefore the Court could not express a concluded view as to whether the joinder of the intended defendant would be futile. He summarised the approach of the court as follows:

“1. A court of first instance should not generally enter into an enquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant.

2. In general, on such an application, the only question which a court will ask itself is whether, on the facts before it, the claim against the intended defendant is clearly or manifestly statute barred: and if there are no circumstances in which an intended defendant would be debarred, either in law or in equity, from relying upon the Statute.

3. If there is doubt upon the question, then the defendant should be joined, and whether or not the claim is in fact statute barred may be dealt with in the ordinary way, if necessary by means of a preliminary issue.

4. Prior to acceding to an application to dismiss such a co-defendant out of proceedings because a claim is statute barred, a court will, naturally, ensure that there is evidence before it so that all the circumstances, and any issue as to the conduct of all the parties prior such joinder, may be considered.

5. However a court of first instance must always retain the discretion to dismiss an application to join as co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process.”

8. For the reasons I explain below, I have concluded that this case is one where the high bar required to refuse to join a co-defendant has been surmounted: the claim against Google is manifestly statute barred; it is clear that Google intends to rely on the statutory provisions that render the application statute barred; and there are no circumstances that would prevent Google from relying on the Statute of Limitations.

Statute of Limitations 1957

9. The applicable time limit for proceedings against a person whom it is alleged is responsible for a defamatory publication on the internet is established by the 1957 Act, as amended by the Defamation Act 2009 (the “2009 Act”). Section 11(2)(c) provides: *“A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of-*

(i) One year, or

(ii) Such longer period as the court may direct not exceeding 2 years, from the date on which the cause of action accrued.”

Section 11(3B) of the 1957 Act provides:

“For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.”

Chronology of Events

10. Before summarising the arguments of the parties, it is necessary to briefly set out the relevant chronology of events. On the plaintiffs’ pleaded case, the allegedly defamatory statements were first published by the defendant on YouTube on or about 23 June 2018. The plaintiffs promptly issued proceedings against the defendant only by way of plenary summons on 29 June 2018. The plaintiffs requested in correspondence between 12 March 2021 and 18 October 2022 that Google remove the Video from YouTube,

indicating that they would seek to join Google to the proceedings if it failed to do so. In response, Google argued that it was not a publisher of the impugned content under s.27 of the 2009 Act. By letter of 2 February 2023, Google’s solicitors wrote stating that the plaintiffs were precluded from bringing proceedings since the action was manifestly time-barred.

11. The plaintiffs issued a notice of motion of 29 March 2021 seeking to join Google but were obliged to issue a fresh motion on foot of liberty from O’Hanlon J. as they had failed to issue a notice of intention to proceed prior to issuing the 2021 motion. A second motion was issued on 12 December 2022. It is that motion that is the subject of this judgment.

Arguments of the parties

12. Turning to the arguments of the parties, the plaintiffs – who were not legally represented – argue Google should be joined as a co-defendant on two grounds. First, the plaintiffs argue that they are not time-barred from joining Google to this defamation action because, once Google are put on notice of defamatory content and refuse to remove said content from their platform, it becomes a secondary publisher, and thus liable for the publication of the allegedly defamatory content. In their initial submissions, the plaintiffs argue that the cause of action accrued on 18 November 2022, a month after they sent a letter to Google – dated 18 October 2022 – requesting that it remove the alleged defamatory content, when Google was put on notice of the offending content and when Google refused to remove said content.

13. However, in their supplemental written submissions, they argue that they wrote to Mr. Leeder, a director of Google on 12 March 2021, which letter was a final request to remove the allegedly defamatory Video with a deadline for 26 March 2021, and that

time began to run from that date. They point to the fact that they filed a motion to join Google within 3 days of that accrual. Ultimately that motion had to be reissued with the permission of O’Hanlon J. because the plaintiffs had not filed a notice of intention to proceed before filing the first motion. Nonetheless, they say that the subsequent refiling of the motion now before the court did not halt or extend the statutory limits as it was simply a reissuance of the original motion for which the court had given permission.

14. Second, the plaintiffs argue that they are in time for the defamation action against the defendant, Fiona O’Leary, and that they should be able to join Google in any event for gross negligence, for which they would not be time-barred.
15. The plaintiffs relied on five cases to substantiate their first ground of argument. Despite having provided written legal submissions in advance of the hearing of the motion, the plaintiffs only provided those cases at the hearing of the motion. Because the plaintiffs are litigants in person, I permitted them to introduce those cases but only on the basis that Google would be given an opportunity to consider them subsequent to the hearing and that written submissions could be put in by both parties on those cases. Google provided written submissions on 11 April 2024 and the plaintiffs replied in writing on 29 April 2024.
16. The five cases identified by the plaintiffs are *Byrne v Deane* [1937] 1 KB 818; *Godfrey v Demon Internet Ltd* [2001] QB 201; *Davidson v Habeeb & Ors* [2011] EWHC 3031 (QB); *Tamiz v Google Inc* [2013] EWCA Civ 68; and *Duffy v Google LLC* [2023] SASC 13. In *Byrne v Deane* [1937] 1 KB 818, a golf club had effectively made themselves liable for an allegedly defamatory poem put up on a notice board as they had the power to remove the poem but chose not to do so. Accordingly, it was held they had effectively

consented to the publication and made themselves liable for continual publication. In *Tamiz v Google* [2012] EWHC 449, the Court of Appeal in the UK found that internet platforms could be considered publishers of comments made by individuals on a blogging service that Google hosted when Google had sufficient notice but failed to remove the allegedly defamatory content. In *Duffy v Google* [2023] SASC 13, Google were found liable for content published through their platforms. As Google were aware the content was being disseminated, it was found that Google were a secondary publisher of defamatory material that appeared in search results of Google's search engine. In *Tamiz v. Google Inc* [2013] EWCA Civ 68, the Court of Appeal similarly found that once Google has been notified of a defamatory blog and had refused to remove it, it was arguable that it was a publisher of that blog, following the reasoning in *Byrne v. Deane*.

17. The case of *Duffy v. Google LLC* [2023] SASC 13 is an authority from South Australia and addresses a fact situation that does not arise here i.e. where there were subsequent instances of publication of the same material. Proceedings were issued in 2016 in respect of publication in 2015/2016 and were within time. The plaintiff then sought in 2020 and 2022 to introduce two further instances of publication in 2017 and 2018. These proceedings were found to be statute barred.
18. The plaintiffs argue that, following the approach in the cases relied upon by them, time begins to run from the date that they sought to have the Video removed.
19. On the other hand, Google submits that pursuant to s.11(3B) of the 1957 Act, the plaintiff's cause of action accrued on or about 23 June 2018, the date that the allegedly defamatory statements were first published in the YouTube Video. Pursuant to section 11(2)(c) of the 1957 Act, the applicable limitation period is one year, extendable to two years at the discretion of the Court. As such, any defamation action in relation to

statements published in the YouTube Video became time-barred at the latest on 23 June 2020. Google argues that the Court has a clear jurisdiction to decline to join a defendant to proceedings where the claim against that defendant is manifestly time-barred, citing *O'Connell v Building and Allied Trades Union* [2012] 2 IR 371.

20. According to Google, the additional cases relied upon by the plaintiffs do not alter the fact that the case is manifestly time-barred. They argue that there was no inhibition on the plaintiffs suing Google prior to the expiry of the statutory time limit, and there was ample time before such expiry in which the plaintiffs could have made any representations they wished to Google concerning the Video, including requesting that it be taken down. As such, it is said the joinder of Google would be manifestly futile.
21. In its supplemental submissions, Google identifies that the cases of *Byrne, Godfrey, Davison* and *Tamiz* all support the proposition that a person may become a publisher of a particular defamatory statement even if they were not involved in its initial publication if, having been informed of it, they omit to take steps to remove the statement. Google accepts that it is possible through acquiescence to become a publisher of defamatory statements, including statements made on the internet in certain circumstances when put on notice of such statements. However, it argues that the question is not whether Google became a publisher of the Video, but, assuming it became a publisher, when time began to run against it for the purposes of the 1957 Act. Here, the cause of action accrued on 23 June 2018, the date on which Ms. O'Leary posted the Video on YouTube. It points out that it is clear that the Video came to the plaintiffs' attention immediately after it was published and there was no reason why the plaintiffs could not have requested the removal of the Video prior to the issuing of the proceedings or issued proceedings against Google in time. Instead, they did not even correspond with Google in relation to the Video until March 2021.

22. Even if the plaintiffs could establish that Google had only become a publisher of the material when it failed to take it down, having been alerted of its existence, that would not change the date upon which the plaintiff's cause of action accrued. Under the clear terms of s.11(3B) of the 1957 Act, that date is when the Video was first capable of being viewed or listened to through the medium of the internet i.e. 23 June 2018. In the circumstances Google argues that the claim is manifestly statute barred and its joinder would be manifestly futile.
23. The plaintiffs in their replying written submissions emphasise that the case law confirms Google's status as secondary publisher as it was notified of defamatory content, did not remove it and therefore a cause of action accrued against it. They argue that Google's liability depends on their response to notifications, not on a specific complaint timeline. According to the plaintiffs, no legal timeframe is specified in law for submitting complaints to Google. They argue that Google cannot accept the principles in the additional cases identified above, while contending time begins to run from the publication of the Video by Ms. O'Leary. The plaintiffs also invoke s. 11(2) of the 2009 Act which permits a court to grant leave to bring more than one defamation action in respect of a multiple publication where it considers that the interests of justice so require.

Discussion and Decision

24. First, I should emphasise that the jurisdiction to refuse to join a proposed co-defendant is a very narrow one. The default position is that parties should be joined. However, as identified in *O'Connell*, if the case against the proposed co-defendant is manifestly statute barred, and it is clear that the proposed co-defendant will rely on that argument should they be joined, the court has an exceptional jurisdiction to refuse to join them.

The question is whether the position as to the applicable limitation period is so clear that I should refuse to join Google i.e. is the plaintiffs' case against it manifestly time barred.

25. Section 11(3B) addresses with great precision the question of when time begins to run in relation to content published on the internet – it is the date on which it is first capable of being viewed or listened to through that medium. That is a stand alone date: it may or may not be the same as the date upon which publication is deemed to have taken place. In this case, if a court finds Google was a publisher (and that is contested by Google), it might hold that the material was published by Google when it was posted by Ms. O'Leary on 23 June 2018, or alternatively it may hold that publication took place when Google refused to take down the material upon being called to do so (described in some of the cases cited by the plaintiffs as “secondary publication”). However, irrespective of which position is adopted, the legislation is crystal clear as to the date of the accrual of the cause of action: it is when the statement is first capable of being viewed or listened to through that medium. The plaintiffs have pleaded at paragraph 6 of the Amended Statement of Claim that the Video was published on 23 June 2018 on YouTube. On the plaintiffs' own case, that must be the date when it was first capable of being viewed or listened to through the medium of the internet.
26. In my view, the specificity of s.11(3B) precludes an argument that the cause of action accrued for the purpose of bringing defamation proceedings on the date there was a refusal to take down material. That is because of the clarity of the section: even if publication was deemed to have taken place only after a refusal to remove material, the cause of action accrues when the material is first capable of being viewed or listened to on the internet.

27. To accept the plaintiffs' argument that the date of publication is when they called upon Google to take down the publication would be to ignore the plain wording of the legislation. In the context of this motion, I am not deciding the substantive question as to the date of publication but only whether the plaintiffs' argument as to the date of publication means that they are not manifestly time barred. But given that I cannot see any version of their argument that would survive the application of the legislation, I am persuaded that they are manifestly time barred. This is because whether one takes the date of publication by Google (if established) as being the placing of the Video on YouTube on 23 June 2018 or the date upon which Google refused to take it down following a request by the plaintiffs in either 2021 or 2022, the legislation still treats the date that the cause of action accrues as the date it was capable of being viewed or listened to on the internet i.e. 23 June 2018.
28. The plaintiffs have pointed to the potential unfairness of the legislation in circumstances where a person might not be aware of the publication on the internet until many years later. But they are not entitled to invoke an argument that does not arise on the facts of their case. They were undoubtedly aware of the article within days of its publication on 23 June 2018 as they issued a plenary summons on 29 June 2018. No explanation has been given as to why they did not join Google at that time or in the months afterwards, or did not write to them within a timely fashion requesting that the article be taken down.
29. In their submissions, the plaintiffs laid some emphasis on multiple instances of publication and the provisions of s.11 of the 2009 Act, and why the accrual of a cause of action should vary if there is multiple publication. But again, this is an argument that does not relate to the facts here. The plaintiffs do not identify multiple instances of publication, or make any argument that they only became aware of the material when

it was published on subsequent occasions. The plaintiffs cannot invoke arguments not referable to their own factual situation.

30. To conclude, in *Hynes*, Clarke J. identified the following cumulative conditions for refusing to join a proposed co-defendant; a court should be satisfied not only that the proposed co-defendant is manifestly time barred, but also that, if joined, the proposed co-defendant will argue the joinder is time barred and will be in a position to raise such an argument. Given the approach taken by Google in this motion, I am so satisfied. I therefore find that all the conditions necessary for refusing to join a proposed codefendant are met in the circumstances of this case.

31. Finally, at the hearing of the motion, the plaintiffs argued that they were not time barred in respect of a cause of action in “gross negligence” and that they intended to amend their pleadings to plead same. No claim of negligence is made in the within proceedings. The plenary summons seeks various reliefs, including damages for the tort of defamation, and damages for loss of reputation and good name. The indorsement to the Amended Statement of Claim of 24 October 2018 includes an injunction under the Defamation Act 2009. There is no claim for damages for negligence in either document. I can only decide this motion on the basis of the pleas in the pleadings before me, and not on the basis of proposed amendments to the pleadings, where no application has even been made to amend. I therefore refuse to entertain any application to join Google on the basis that it is intended to amend these pleadings to include a plea of negligence.

Conclusion

32. In the circumstances, for the reasons set out above, I refuse the plaintiffs leave to join Google to these proceedings as a co-defendant. I will list this matter on Wednesday **11 June at 2pm** for submissions on costs. No written submissions are required in advance.