

MAKING THE CHOICE BETWEEN MERGER AND CONCURRENCY RULES IN TORT: A COMMENT ON *YOUNG V. BELLA*

Richard Macklin*

The question of whether an action alleging false words leading to damage has to be brought in defamation, or whether such claims can be pleaded as other torts alongside defamation allegations, has been the source of much contention. This paper provides an analysis of the status of the defamation merger/concurrency debate following the decision of the Supreme Court of Canada in Young v. Bella. The author examines the history of the two competing approaches, providing an analysis of the case law prior to Young v. Bella and detailing the position of the Supreme Court following that decision.

Une action en justice fondée sur des allégations de paroles mensongères doit-elle être traitée uniquement comme de la diffamation, ou peut-elle être accompagnée d'une action parallèle en dommages-intérêts pour perte de réputation ? Ce débat, engagé depuis longtemps en common law, est analysé dans cet article sous l'éclairage de la décision Young c. Bella de la Cour suprême du Canada. L'auteur brosse un tableau historique des deux approches, avec une analyse de la jurisprudence antérieure au jugement de la Cour suprême et une description détaillée de la position de la Cour suprême suite à sa récente décision.

Introduction

In the recent case of *Young v. Bella*, the Supreme Court of Canada appears to have settled the debate on whether an action alleging false words leading to damage has to be brought in defamation.¹ Prior to *Young v. Bella*, some courts had struck loss of reputation claims made outside the context of a defamation action, on the basis that those claims merged with the tort of defamation (the merger argument). Other courts allowed non-defamation torts to be pleaded, in reputation loss cases, alongside defamation allegations (the concurrency argument). The defendants in *Young v. Bella* raised the merger argument throughout those proceedings. All three courts that heard the case, including the Supreme Court of Canada, rejected the

* Of Stevensons LLP. Thank you to Paul Schabas for reviewing this comment and providing his invaluable input.

¹ *Young v. Bella* [2006] 1 S.C.R. 108, 261 D.L.R. (4th) 516 (S.C.C.).

merger argument in favour of concurrency.

Although the *Young v. Bella* judgment addresses several important issues in tort law, including the issue of the scope of duty of care in the context of sexual abuse allegations, this comment will only address the defamation merger/concurrency debate. I will first outline the rationale for the two rules. I will then analyze the case law prior to *Young v. Bella* and finally, will set out what the Supreme Court in *Young v. Bella* has said on this issue. I conclude that an approach allowing concurrent claims for loss of reputation in defamation along with other torts is to be preferred.

The Merger and the Concurrency Rules: Rationale

The merger rule stems from the concern that the general law of torts should not allow a plaintiff to run an "end-around" the long-standing defamation defences of qualified privilege and fair comment. It is argued that the common law has struck a fine balance between freedom of speech on the one hand and the right to damages for false statements on the other hand. That balance has been struck in favour of free speech in those cases where a defence of qualified privilege or fair comment would prevail. To allow a plaintiff to sue in a non-defamation tort in the case of a false statement would eviscerate those defences. The need to prove malice would no longer rest on the plaintiff and indeed, liability could be imposed in the absence of malice.

The concurrency rule, on the other hand, recognizes that a plaintiff should be entitled to a remedy anytime that he or she establishes all of the elements of a particular tort. Indeed, tort law is meant to provide a remedy for an aggrieved plaintiff and serve as a deterrent for tortious behaviour. Why then should a plaintiff who has established all of the elements of a non-defamation tort be denied a remedy, and a culpable defendant escape liability, simply because the misdeeds of the defendant also display some of the elements of the tort of defamation?

The Merger and the Concurrency Rules: Pre-Young v. Bella

Defendants who argue that the merger rule should govern often begin their submissions with a recitation of the *dicta* from Hallett J., in *Foaminol Laboratories, Ltd. v. British Artid Plastics, Ltd.*² In *Foaminol*, the plaintiff claimed a loss of reputation as a result of a supplier's breach of contract. For the majority Hallett J. stated:

² [1941] 2 All E.R. 393 (K.B.) [*Foaminol*].

[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.³

From the perspective of the defendant, a bright-line merger rule is generally preferred. Short notice and limitation periods apply to defamation actions when the defamatory words are re-published in a newspaper or broadcast.⁴ The defences of qualified privilege and fair comment protect many false statements so long as the statement is made in an appropriate circumstance and in good faith.⁵

Plaintiffs, on the other hand, will not want to have their claims narrowed at the outset and may wish to benefit from the flexibility of suing under several different causes of action.⁶ Thus, a plaintiff seeking to avoid the consequences of the merger rule will assert a "modern view" of the law and rely on the relatively recent judgment from the House of Lords in *Spring v. Guardian Assurance PLC*.⁷

In *Spring*, the plaintiff sought to sue for negligence in respect of a reference letter prepared by a former employer on the plaintiff's behalf. The defendants argued that the law of defamation formed a complete code for the plaintiff's complaint and that accordingly, he could not sue in negligence. In a four to one decision, the House of Lords upheld the right of the plaintiff to sue in negligence. Each of the four judgments constituting the majority decision concluded that a negligence action can be sustained in the context of a false publication and that the plaintiff could recover damages for the "proximate" pure economic loss that flowed from that publication. The judgments of Lord Slynn and Lord Woolf went the furthest towards nullifying the merger rule. Lord Slynn stated:

As to the first question the starting-point in my view is that the suggested claim in negligence and the torts of defamation and injurious and malicious falsehood do not cover the same ground, as Mr. Tony Weir shows in his note in [1993] C.J.L. 376. They are separate torts, defamation not requiring a proof by the plaintiff that the statement was

³ *Ibid.* at 399.

⁴ See for example the *Libel and Slander Act*, R.S.O. 1990, c. L-12, ss. 5 and 6. Most provinces have similar legislation.

⁵ *R.T.C. Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726 (C.A.).

⁶ See generally, *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12.

⁷ [1994] 3 W.L.R. 354 (H.L.) [*Spring*]. The lack of modernity in the merger argument was emphasized by Lord Slynn who noted (at 382) that the merger argument was long-standing to the point of pre-dating the Law Lords' landmark judgment in *Donoghue v. Stevenson*, [1932] A.C. 562.

untrue (though justification may be a defence) or that he suffered economic damage, but being subject to defences quite different from those in negligence, such as the defence of qualified privilege which makes it necessary to prove malice. Malicious falsehood requires proof that the statement is false, that harm has resulted and that there was express malice. Neither of these involves the concept of a duty of care. *The essence of a claim in defamation is that a person's reputation has been damaged; it may or not involve the loss of a job or economic loss. A claim that a reference has been given negligently is essentially based on the fact, not so much that reputation has been damaged, as that a job, or an opportunity, has been lost.*⁸

As stated by Lord Woolf:

This is also demonstrated by what would be the respective approaches to damages in an action based on defamation and negligence. *In the case of defamation the primary head, but not the only head, of damages is as to the loss of reputation. In an action for negligence, on the other hand, the subject of the reference will be primarily interested in and largely limited to his economic loss. To prevent the law of negligence applying to the present situation, when it is otherwise fair and just that it should apply, by the imposition of a requirement to prove malice in effect amounts to transferring a defence which has been developed for one tort to another tort to which it has never been previously applied when it is inappropriate to do so.*⁹

Lord Woolf went on to observe:

The historic development of the two actions has been quite separate. Just as it has never been a requirement of an action for defamation to show that the defamatory statement was made negligently, so, if the circumstances establish that it is fair and just that a duty of care should exist, the person who suffers harm in consequence of a breach of that duty should not have to establish malice, merely because that would be a requirement in an action for defamation. *I can see no justification for erecting a fence around the whole of the field to which defamation can apply and treating any other tort, which can beneficially from the point of view of justice enter into part of that field, as a trespasser if it does so.*¹⁰

⁸ *Ibid.* at 384 [emphasis added]. Although *Spring* addressed the issue of whether the tort of negligence could apply to a false publication, it is submitted that there is no basis in principle to differentiate between other economic torts (such as abuse of public office) and negligence in relation to a plaintiff's ability to plead these torts concurrently with defamation. Abuse of public office, like negligence, is a tort with a considerable economic loss component separate from the reputation interest aspects of the tort. See *Roncarelli v. Duplessis* (1959), 16 D.L.R. (2d) 689 (S.C.C.), where the plaintiff was awarded damages for loss of the value of liquor seized, lost profits, damage to reputation and reduced business goodwill. The same line of reasoning would apply to the torts of conspiracy to injure and interference with economic relations.

⁹ *Spring, ibid.* at 399 [emphasis added].

¹⁰ *Ibid.* at 398-99 [emphasis added].

Thus the outcome of the merger/concurrency debate in the United Kingdom has benefits for both sides. There are instances where other torts will merge with the tort of defamation. Those instances, however, appear to be restricted to cases where the plaintiff claims a mere loss of reputation. When the defamatory language goes on to cause economic loss, however, it appears that the merger argument no longer applies.

In Canada, prior to *Young v. Bella* the merger rule from *Foaminol* had been applied either expressly or implicitly in several cases.¹¹

With two notable exceptions, each of these was a case where "mere loss of reputation" was at issue and did not involve claims for economic loss. The first notable exception is the judgment of the British Columbia Supreme Court in *PG Restaurants Ltd. v. Northern Interior Regional Health Board*.¹² In this case an official commented to a journalist about a finding by public health inspectors that a restaurant had unsanitary conditions and this comment allegedly caused economic loss to the plaintiff. At trial, though the plaintiff succeeded on other grounds, the negligence claim against the official was dismissed on the basis of the merger argument. On appeal, the merger issue was not considered. It should be noted that the analysis of the merger argument by the British Columbia Supreme Court in *PG Restaurants* was rejected by the same court in *Dinyer-Fraser v. Laurentian Bank*, another case involving an economic loss claim.¹³

The second notable exception is *St. Elizabeth Home Society v. Hamilton (City)*.¹⁴ In that case, two municipalities conducted an investigation into a retirement home owned by the plaintiff and issued an order stating that the home, amongst other things, had breached a

¹¹ See *Fulton v. Globe & Mail* (1997), 152 D.L.R. (4th) 377 (Alta. Q.B.); *Trizec Properties Inc. v. Citigroup Global Markets Inc.* (2004), 72 O.R. (3d) 265 (S.C.J.); *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (G.D.), aff'd on other grounds (1995), 25 O.R. (3d) 302 (C.A.); *Buller et al. v. Southam Inc. et al.* (2000), 191 N.S.R. (2d) 158 (S.C.), varied on other grounds (2001), 197 N.S.R. (2d) 97 (C.A.) [*Butler*]; *PG Restaurants*, *infra* note 12; *St. Elizabeth*, *infra* note 14; *Bai v. Sing Tao Daily Ltd.*, [2003] O.J. No. 1917 (C.A.).

¹² (2004), 25 B.C.L.R. (4th) 242 (S.C.), rev'd on other grounds (2005), 38 B.C.L.R. (4th) 77 (C.A.) [*PG Restaurants*].

¹³ (2005), 40 B.C.L.R. (4th) 39 (S.C.) [*Dinyer-Fraser*]. The trial judge in this case has perhaps most eloquently framed the debate between concurrency and merger. According to Ballance J. (at para. 219), merger applies where the negligence claim is no more than an alleged breach of the duty of care not to defame. In the case of more substantive negligence allegations, the concurrency rule would prevail.

¹⁴ [2005] O.J. No. 5369 (S.C.), appeal as of right to the C.A.

municipal by-law regarding the provision of emergency services to seniors and had served recycled food. While these allegations were not proven, the plaintiff suffered economic loss by way of a reduced number of new admissions. The Ontario Superior Court accepted the merger argument and held that the plaintiff could not sue in negligence for the economic loss it suffered.

Interestingly, the vast majority of Canadian judgments adopting the merger argument have been at the trial level. The weight of Canadian appellate authority, on the other hand, even before the Supreme Court judgment in *Young v. Bella*, either expressly or implicitly adopted the concurrency approach taken by the majority in *Spring*.¹⁵

An express acceptance of *Spring* occurred in *Haskett v. Equifax Canada*.¹⁶ In *Haskett*, a representative plaintiff brought a class action against a credit bureau for false and negligent compilation of credit information that caused him and others economic loss. The credit bureau moved to strike the claim partly on the basis of the merger argument. The Court of Appeal for Ontario, relying on the majority judgments in *Spring*, rejected the credit bureau's merger argument.

An example of an implicit acceptance of the concurrency rule espoused in *Spring* occurred in *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*.¹⁷ In that case, the Manitoba Court of Appeal dismissed an appeal from a judgment awarding damages flowing from publication in a newspaper of unfounded search warrant allegations. Damages for the false statement in *Uni-Jet* were thus awarded to the plaintiff under the tort of abuse in public office in circumstances where the plaintiff had not framed any part of the claim in defamation.

It may also be noted that in *Gatley on Libel and Slander*, the authors include an entire chapter setting out the various tenable non-defamation causes of action arising from statements.¹⁸ In other words, according to the

¹⁵ See *Haskett v. Equifax Canada* (2003), 63 O.R. (3d) 577 (C.A.) at paras. 53-54; *Misir v. Toronto Star Newspapers Ltd.* (1997), 105 O.A.C. 270 (C.A.) at paras. 24-25; *Peters-Brown v. Regina District Health Board*, [1996] 1 W.W.R. 337 (Sask.Q.B.) at pp. 341-42, aff'd [1997] 1 W.W.R. 638 (Sask.C.A.) [*Peters-Brown*]; *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, (2001), 198 D.L.R. (4th) 577 (Man.C.A.). The judgment of the Newfoundland Court of Appeal in the case being discussed here can be found at *Young v. Bella* (2004), 241 Nfld. & P.E.I.R. 35 (Nfld.C.A.). See also *Enviro-Tex Products Inc. v. Fibrex Installations Inc. et al.* (Unreported: May 23, 2006) (Ont.C.A.).

¹⁶ *Haskett*, *ibid.*

¹⁷ *Supra* note 15.

¹⁸ P. Milmo et al, eds., *Gatley on Libel and Slander* (London: Sweet & Maxwell, 2004).

definitive Commonwealth text on defamation law, there is no complete code for causes of action arising from statements. In terms of the general policy arguments against merger, the authors state:

Defamation and negligence are different torts with different requirements: negligence requires the claimant to establish a duty of care and to prove a breach of it on a balance of probabilities, whereas in defamation the claimant establishes a case simply by showing that the words were defamatory, it then being for the defendant to prove that they were true or to demonstrate the applicability of qualified privilege or fair comment; defamation protects a person's reputation and in most cases is actionable per se, whereas in negligence the claimant must prove some actual loss recognized by law (such as loss of property or employment) and that it has been caused by the negligence of the defendant; and there may be cases of damaging statements which cannot be actionable as defamation because they do not reflect upon the defendant's character.¹⁹

The Merger and Concurrency Rules: Young v. Bella

In *Young v. Bella*, a professor marking a student paper became concerned, based on the content of the paper, that the student was a child abuser. The professor reported her concerns to the director of the university and this led to the dispatch of a "suspected ill-treatment" report to the provincial Children Protection Services Branch. Several meetings followed involving, at different times, three university professors, the RCMP and a minimum of ten social workers. It was not until two years after the "ill treatment" report that the student was confronted about the suspicion that she might be a child abuser. The student was able to dispel all concerns by producing the source of the material in her paper. She subsequently sued the professor, the department director and the university for negligently setting in motion a series of events that affected her reputation in the community and reduced her income-earning capacity. A jury awarded over \$1 million in damages in negligence, the trial judge having removed the defamation claim from the jury. An appeal from that judgment was allowed, and a unanimous seven-member panel of the Supreme Court of Canada ultimately restored the trial verdict.²⁰

Throughout the proceedings the defendants asserted that the plaintiff's claim was a defamation action "dressed up as a negligence action" and argued that since the defamation action was dismissed, the negligence

¹⁹ *Ibid.* at 600-601, para. 21.4(1). This work also contains a detailed discussion of the implications of *Spring* at 597-601.

²⁰ *Supra* note 1.

action had to be dismissed as well. As noted above, the merger argument was rejected at all three court levels. The definitive statement of the Supreme Court of Canada with respect to the merger/concurrency issue provides significant guidance to litigants in all provinces. The court framed the merger argument as raised by the respondents/defendants as follows:

The respondents [...] argue that the appellant's claim is really an action for defamation, dressed up as a negligence action. They say that her action is essentially for loss of reputation, and that damages for loss of reputation can only be claimed in a defamation action to which the issues of malice and qualified privilege are relevant. They say resort to negligence law interfered with the exercise of their freedom of expression of an opinion to CPS. Negligence principles, they assert, do not strike the proper balance between free expression and the duty not to harm others.²¹

The court went on to reject the merger argument for those circumstances where the damages caused by the false words cover "more than just harm to the plaintiff's reputation" and cited *Spring* as authority for this proposition.²² The court distinguished *Fulton* and *Elliott*,²³ cases which had accepted the merger argument, on the basis that those were cases in which there was no pre-existing relationship between the parties; in those circumstances a negligence claim was bound to fail since a pre-existing "neighbour" relationship is a well-established element of that tort. The court also held that freedom of expression and the policies underlying qualified privilege could be taken into account in determining the appropriate standard of care:

There is no reason in principle why negligence actions should not be allowed to proceed where (a) proximity and foreseeability have been established, and (b) the damages cover more than just harm to the plaintiff's reputation (i.e. where there are further damages arising from the defendant's negligence) [...]. In fact, all of the cases cited by the respondents as standing for the proposition that defamation had "cornered the market" on reputation damages were cases in which (unlike here) there was no pre-existing relationship between the parties that gave rise to a duty of care.²⁴

Conclusion

It is submitted that the modern view expressed in *Young v. Bella* and *Spring v. Guardian* is the correct view. It seems an unlikely proposition

²¹ *Ibid.* at para. 55.

²² *Ibid.* at para. 56.

²³ *Supra* note 11.

²⁴ *Ibid.*

that one can draw a bright line around any claim dealing with the reputation of a plaintiff and say that the claim must be brought in defamation, to the exclusion of all other torts. Such a bright line does make sense in cases of a mere loss of reputation where the factual circumstances will be narrowly drawn and the right to damages adequately protected within the tort of defamation. To go further, however, would risk subsuming several torts and other areas of law within the tort of defamation anytime a reputation interest of any kind is brought into play. Indeed, it is difficult to reconcile the merger argument with other areas of law where reputation losses can clearly be compensated without suing for defamation, such as contract;²⁵ malicious prosecution;²⁶ abuse of public office;²⁷ negligence²⁸ and negligent investigation.²⁹ If the merger argument is correct, it would cast doubt on well-established principles in all of these areas.

A narrowly applied merger rule, however, is still a good idea in some circumstances. Thus, for example, the merger argument will almost always apply to defamation claims against the news media. A negligence claim would not be appropriate in these cases because there will, in most instances, not have been a pre-existing relationship between the parties. Secondly, most media defamation cases would fall into the category of a breach of the "duty to not defame," which is not a recognized duty in negligence law.³⁰ Thirdly, the common law has already developed a standard for responsible journalism within the tort of defamation.³¹ It is submitted that there would be no utility in adding a negligence analysis to this context and confusing the law in this area.

The most sensible approach would be to restrict the merger rule and affirm the distinction, as the courts of last resort in both Canada and the United Kingdom have done, between claims for mere loss of reputation and those where an economic loss flows from the false statements. In the former case, the action should be brought in defamation. In the latter circumstance, the action may be brought under any tort, contract or property cause of action providing, of course, the other elements are made out.

²⁵ See Waddams *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at 538-39.

²⁶ See Fridman, *The Law of Torts in Canada*, 2d. ed. (Toronto: Carswell, 2002) at 859.

²⁷ See *Roncarelli v. Duplessis*, *supra* note 8; *Uni-Jet*, *supra* note 15.

²⁸ See *Spring*, *supra* note 7; *Peters-Brown*, *supra* note 15.

²⁹ See *Beckstead v. Ottawa (City) Chief of Police* (1997), 37 O.R. (3d) 62 (C.A.), *aff'd* (1995) 37 O.R. (3d) 64 (G.D.).

³⁰ See *Dinyer-Fraser*, *supra* note 13 at para. 219.

³¹ See *Reynolds v. Times Newspapers Ltd. and others*, [1999] All E.R. 609.