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Libel Tourism and Forum Shopping: The Supreme Court of Canada Applies the Van Breda Test to an Internet Defamation Claim

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By Michael Statham

In *Haaretz.com v. Goldhar*,[1] a decision released on June 6, 2018, the Supreme Court of Canada confronted the array of thorny analytical and practical issues raised by multijurisdictional defamation claims. In the first paragraph of her reasons, Justice Côté framed the challenge this way:

While [multijurisdictional defamation claims] are not new, the exponential increase in multijurisdictional publication over the Internet has led to growing concerns about libel tourism and the possible assumption of jurisdiction by an unlimited number of forums.

In grappling with this challenge, the Court produced five different sets of reasons.[2] It was common ground across the five sets of reasons that the challenges posed by "libel tourism", and the ease with which allegedly defamatory material can be electronically published and consumed across a range of jurisdictions, can be met by applying the current rules for the assumption and exercise of jurisdiction as previously set out in the Court's 2012 *Van Breda* decision.[3]

There were differences among the Court on the application of the *Van Breda* framework to this case, however. A majority of the Court allowed the appeal and concluded that Israel was a clearly more appropriate forum than Ontario in which to litigate Mr. Goldhar's claim.[4] Chief Justice McLachlin and Justices Moldaver and Gascon, in dissent, agreed with the courts below that Ontario was clearly a more convenient forum for the dispute.

The Factual Backdrop

Mr. Goldhar is a prominent Canadian businessperson who owns the Maccabi Tel Aviv Football Club in Israel. In 2011, an Israeli newspaper published an article about Mr. Goldhar that commented on his ownership and management of Maccabi Tel Aviv. The article also referenced his Canadian business and his approach to management.

The article was published in print and electronically in Hebrew and English. While no print copies were distributed in Canada, it was available electronically. The motion judge found it likely that 200 to 300 people in Canada read the article. Many more people read the article in Israel.

Mr. Goldhar alleged that the article was libellous and commenced an action in Ontario. The newspaper moved to stay the action on the basis that the Ontario courts did not have jurisdiction over the claim. Alternatively, the newspaper argued that Israel was the

more convenient forum for Mr. Goldhar's action.

The motion judge dismissed the newspaper's motion, finding that Ontario courts had jurisdiction and refusing to decline to exercise this jurisdiction in favour of Israeli courts. A majority of the Ontario Court of Appeal dismissed the newspaper's appeal.

Analysis

Justice Côté (writing, as well, for Justices Brown and Rowe) began her analysis by emphasizing the different roles played by jurisdiction *simpliciter* (whether the court *has* jurisdiction) and *forum non conveniens* (whether the court *should* exercise jurisdiction) as previously set out in *Van Breda*. In Justice Côté's words: "the real and substantial connection test at the jurisdiction *simpliciter* stage prioritizes order, stability and predictability by relying on objective connecting factors for the assumption of jurisdiction. Conversely, the *forum non conveniens* analysis emphasizes fairness and efficiency by adopting a case-by-case approach to identify whether an alternative jurisdiction may be 'clearly more appropriate'."[5]

In this case, the real and substantial connection test was easily met because Mr. Goldhar's claim was in respect of a tort committed in Ontario and, as such, a "presumptive" connecting factor existed. The alleged defamation occurred in Ontario because, as Justice Côté noted, "the *situs* of Internet-based defamation is the place where the defamatory statements were read, accessed or downloaded by the third party".[6]

From there, Justice Côté considered whether the presumptive connecting factor could be rebutted on the facts of this case. In undertaking this analysis, Justice Côté adverted to the risk of "jurisdictional overreach" in Internet defamation cases where jurisdiction can be readily presumed by a single download of the offending article. However, in this case, the newspaper failed to rebut the presumption because the evidence adduced on the motion failed "…to establish that [the newspaper] could not reasonably have expected to be called to answer a legal proceeding in Ontario."[7] Unlike a case in which a plaintiff has no reputation in the forum in which he or she seeks to proceed, Mr. Goldhar lived and operated business in Ontario, and the article directly referenced his Canadian residency and business practices.

Having found that the Ontario court had jurisdiction, Justice Côté went on to consider whether the Court should exercise its jurisdiction in this case. Justice Côté answered "no". The Court found that Israel was a clearly more appropriate forum than Ontario for Mr. Goldhar's action, and the newspaper's appeal was allowed on this basis.

Justice Côté returned to the concern that she had earlier expressed about the ease with which jurisdiction *simpliciter* may be established in Internet defamation cases. Given that the establishment of a presumptive connecting factor is "virtually automatic" in such cases, Justice Côté found that motions judges "must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens*", and be "particularly attuned to concerns about fairness and efficiency"[8] at this stage of the analysis. This does not impose "a different standard or burden for defamation cases", however.[9]

Against this background, Justice Côté held that the motion judge's *forum non conveniens* analysis was replete with errors. On a "robust and careful" analysis, Justice Côté concluded that: (i) the newspaper would face substantial unfairness and inefficiency if a trial were held in Ontario; and (ii) Mr. Goldhar's interest in vindicating his reputation in Ontario failed to outweigh these concerns[10]. As such, Israel was clearly the more appropriate forum.

One of the *forum non conveniens* factors canvassed in Justice Côté's decision is the applicable law – i.e. the law that applies to the determination of the claim. Justice Côté cited the Court's well-established principle that choice of law is determined by the place where the tort occurs. On that basis, Justice Côté did not disturb the motion judge's conclusion that the applicable law favoured Ontario. In the course of her analysis, however, Justice Côté considered Justice Pepall's dissenting opinion in the Ontario Court of Appeal that the place where the tort occurs "is too thin a strand on which to anchor choice of law in an internet defamation case…",

and that the court should instead determine choice of law in such cases by ascertaining the place of most substantial harm to reputation. The latter had been suggested as an alternative approach to Internet defamation cases by Justice LeBel in the Court's 2012 decision in *Banro*.[11]

For her part, Justice Côté declined to adopt a place of most substantial harm test in this case. First, the submissions on the issue provided an insufficient basis on which to create such an exception. Second, the evidence adduced on the motion did not permit Justice Côté to determine where, as between Ontario and Israel, Mr. Goldhar enjoyed the most substantial reputation or where the most substantial harm to that reputation occurred. Justice Côté left the issue open for a future case.

In any event, Justice Côté assigned little weight to the choice of law factor relative to the range of other relevant factors in the *forum non conveniens* analysis.

In concurring reasons, Justice Karakatsanis agreed with Justice Côté's overall conclusion, but disagreed with certain aspects of the *forum non conveniens* analysis.

Similarly, Justices Abella and Wagner, in separate reasons, agreed with Justice Côté's overall conclusion. However, the two Justices were prepared to adopt the "most substantial harm" test in place of the "place where the tort occurred" test to assess the choice of law factor in the *forum non conveniens* analysis of this Internet defamation claim. Unlike Justice Côté, Justices Abella and Wagner were satisfied that they could conclude from the factual record that the place of most substantial harm to Mr. Goldhar's reputation was Israel and, as a result, that: (i) Israeli law should apply; and (ii) Israel was the clearly more appropriate forum.

In dissent, the Chief Justice and Justices Moldaver and Gascon held that the test for jurisdiction *simpliciter* was met in this case and that "…the current rules that govern its application accommodate multijurisdictional defamation cases, with no need to apply a robust review at the *forum non conveniens* stage."[12]

Specifically, while acknowledging the ease with which jurisdiction may be presumptively assumed in Internet defamation cases, the Chief Justice held that the reasonable foreseeability of being sued in a jurisdiction in which the impugned statements caused harm is a significant check against any concerns of forum shopping. Here, it was readily foreseeable that the newspaper would be sued in Ontario, which the Chief Justice described as the place where the "sting of the article truly is."[13]

The Chief Justice deferred to the motion judge's *forum non conveniens* analysis, holding that "[a]bove all else, fairness concerns militate in favour of Mr. Goldhar being able to vindicate his reputation in the place where his Canadian business practices were impugned and the sting of the article was felt by him."[14] Further, the Chief Justice considered it "both unwise and unnecessary" to adopt the place of most substantial harm rule favoured by Justices Abella and Wagner.[15]

Conclusion

The decision yields three significant bits of guidance in Internet defamation claims. First, it establishes that the *forum non conveniens* stage of the *Van Breda* test is the battleground for jurisdictional challenges to Internet defamation claims. Presuming at least one Ontario download of an offending article, the question is not whether an Ontario court has jurisdiction but, rather, whether it ought to exercise it, or defer in the face of a clearly more appropriate forum. Second, a majority of the Court called for a "robust and carefully scrutinized" *forum non conveniens* analysis as a bulwark against the ills of libel tourism or forum shopping in any particular case. Third, the Court is not yet prepared to replace the "place where the tort occurred" test with the "place of most substantial harm" test as the choice of law factor in the *forum non conveniens* analysis. Justice Côté's decision left the issue open for another internet defamation case on another day.

[1] 2018 SCC 28.

[2] (**i)** Reasons of Justices Côté, Brown and Rowe (paras. 1-98); **(ii)** Reasons of Justice Karakatsanis (paras. 99-103) **(iii)** Reasons of Justice Abella (paras. 104-143); **(iv)** Reasons of Justice Wagner (paras. 144-150); and **(v)** Reasons of Chief Justice McLachlin and Justices Moldaver and Gascon (paras. 151-240).

[3] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

[4] There were differences in Justices Côté's, Karakatsanis', Abella's and Wagner's respective *forum non conveniens* analyses that drove their shared conclusion that Israel was the more appropriate forum. Some of these differences are further explained herein.

[5] Para. 28.

[6] Para. 36.

[7] Para. 45.

[8] Para. 48.

[9] Para. 48.

[10] Para. 95.

[11] *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18.

[12] Para. 161.

[13] Para. 172.

[14] Para. 239.

[15] Para. 198.

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