Supreme Court of Canada: Israel, not Ontario, is Forum Conveniens for Libel Proceedings

The decision to stay proceedings under the doctrine of *forum non conveniens* is discretionary, which in part means that appeal courts should be reluctant to reverse the decisions of motions judges on the issue. It comes as some surprise, therefore, that the Supreme Court of Canada has disagreed with not only the motions judge but also the Court of Appeal for Ontario and overturned two earlier decisions denying a stay. In *Haaretz.com v Goldhar* (available here) the court held (in a 6-3 decision) that the plaintiff's libel proceedings in Ontario should be stayed because Israel is the clearly more appropriate forum.

The decision is complex, in part because the appeal also considered the issue of jurisdiction and in part because the nine judges ended up writing five sets of reasons, four concurring in the result and a fifth in dissent. That is very unusual for Canada's highest court.

The case concerned defamation over the internet. The plaintiff, a resident of Ontario, alleged that an Israeli newspaper defamed him. Most readers of the story were in Israel but there were over 200 readers in Ontario.

On assumed jurisdiction, the court was asked by the defendant to reconsider its approach as set out in *Club Resorts* (available here), at least as concerned cases of internet defamation. Eight of the nine judges refused to do so. They confirmed that a tort committed in Ontario was a presumptive connecting factor to Ontario, such that it had jurisdiction

unless that presumption was rebutted (and they held it was not). They also confirmed the orthodoxy that the tort of defamation is committed where the statement is read by a third party, and that in internet cases this is the place where the third party downloads and reads the statement (paras 36-38 and 166-167). Only one judge, Justice Abella, mused that the test for jurisdiction should not focus on that place but instead on "where the plaintiff suffered the most substantial harm to his or her reputation" (para 129). This borrows heavily (see para 120) from an approach to choice of law (rather than jurisdiction) that uses not the place of the tort (*lex loci delicti*) but rather the place of most substantial harm to reputation to identify the applicable law.

On the stay of proceedings, six judges concluded that Israel was the most appropriate forum. Justice Cote wrote reasons with which Justices Brown and Rowe concurred. Justice Karakatsanis disagreed with two key points made by Justice Cote but agreed with the result. Justices Abella and Wagner also agreed with the result but, unlike the other seven judges (see paras 91 and 198), they adopted a new choice of law rule for internet defamation. This was a live issue on the stay motion because the applicable law is a relevant factor in determining the most appropriate forum. They rejected the *lex loci delicti* rule from *Tolofson* (available here) and instead used as the connecting factor the place of the most substantial harm to reputation (paras 109 and 144). Justice Wagner wrote separately because he rejected (paras 147-148) Justice Abella's further suggestion (explained above) that the law of jurisdiction should also be changed along similar lines.

The core disagreement between Justice Cote (for the majority) and the dissent (written jointly by Chief Justice McLachlin and Justices Moldaver and Gascon) was that Justice Cote concluded that the motions judge made six errors of law (para 50) in applying the test for *forum non conveniens*, so that no

deference was required and the court could substitute its own view. In contrast, the dissent held that four of these errors were "merely points where our colleague would have weighed the evidence differently had she been the motions judge" (para 179) which is inappropriate for an appellate court and that the other two errors were quite minor and had no impact on the overall result (para 178). The dissent held strongly to the orthodox idea that decisions on motions to stay are entitled to "considerable deference" (para 177) lest preliminary motions and appeals over where litigation should occur undermine stability and increase costs (para 180).

Another fundamental disagreement between Justice Cote and the dissent was their respective view of the scope of the plaintiff's claim. During the motion and appeals, the plaintiff made it clear that he was only seeking a remedy in respect of damage to his reputation in Ontario (as opposed to anywhere else) and that he was not going to sue elsewhere. The dissent accepted that this undertaking to the court limited the scope of the claim (paras 162-163) and ultimately it pointed to Ontario as the most appropriate forum. In contrast, Justice Cote held that the plaintiff's undertaking "should not be allowed to narrow the scope of his pleadings" (para 23). It is very hard to accept that this is correct, and indeed on this point Justice Karakatsanis broke with Justice Cote (para 101) and agreed with the dissent. Why should the court not accept such an undertaking as akin to an amendment of the pleadings? Justice Cote claimed that "[n]either Goldhar nor my colleagues … may now redefine Goldhar's action so that it better responds to Haaretz's motion to stay" (para 24). But why should the plaintiff not be able to alter the scope of his claim in the face of objections to that scope from the defendant?

There are many other points of clash in the reasons, too many to engage with fully here. How important, at a preliminary stage, is examination of what particular witnesses who have to

travel might say? What role does the applicable law play in the weighing of the more appropriate forum when it appears that each forum might apply its own law? Does a subsequent proceeding to enforce a foreign judgment count toward a multiplicity of proceedings (which is to be avoided) or do only substantive proceedings (on the merits) count? Is it acceptable for a court to rely on an undertaking from the plaintiff to pay the travel and accommodation costs for the defendant's witnesses or is this allowing a plaintiff to "buy" a forum?

It might be tempting to treat the decision as very much a product of its specific facts, so that it does not offer much for future cases. There could, however, be cause for concern. As a theme, the majority lauded "a robust and careful" assessment of *forum non conveniens* motions (para 3). If this robust and careful assessment is to be performed by appellate courts, is this consistent with deference to motions judges in their discretionary, fact-specific analysis? The dissent did not think so (para 177).