Torts and Tourists in the Supreme Court of Canada

In *Sinclair v Venezia Turismo*, 2025 SCC 27 (available here) the Supreme Court of Canada has, by 5-4 decision, held that the Ontario court does not have jurisdiction to hear claims by Ontario residents against three Italian defendants in respect of a tort in Italy. The Sinclair family members were injured in a gondola collision in Venice that they alleged was caused by the Italian defendants. But there were several connections to Ontario. The trip to Italy had been booked by Mr Sinclair using a premium credit card's concierge and travel agency service [4, 156] and the gondola ride had been arranged through that service [15, 160]. The card was with Amex Canada and one or more contracts connected to the gondola ride had been made in Ontario. The Sinclairs were also suing Amex Canada and the travel service for carelessness in making the arrangements with the Italian defendants, and those defendants attorned in Ontario [167, 172]. A core overall issue, then, was whether the plaintiffs would be able to pursue all of their claims arising from the gondola collision, against various defendants, in one legal proceeding in Ontario.

For assumed jurisdiction, Canadian common law requires that the plaintiff establish a presumed connecting factor (PCF) in respect of each defendant. Once established, the defendant can rebut the PCF by showing that it does not point to a real relationship, or only a weak relationship, with the plaintiff's chosen forum [7, 49, 202, 216]. It is well established that damage sustained by the plaintiff abroad, and continuing to be suffered in the forum, is not a PCF. While less clear, the better view of the law is that the defendant's being a "proper party" to a proceeding advanced against a local defendant is not a PCF. So neither of these routes to jurisdiction, familiar in some legal systems, was available despite their fitting the facts.

Canadian courts have held that the fact that a contract connected with a tort was made in the forum is a PCF. This is controversial because many have questioned the strength of this connection, based as it is on the place of making a contract, but it has been repeatedly endorsed by the Supreme Court of Canada. *Sinclair* turned on whether this PCF had been established and if so rebutted [1, 51, 146]. The majority (decision written by Justice Cote) found the defendants had rebutted

the PCF; the dissent (decision written by Justice Jamal) found not.

The reasons are a challenging read. The majority and dissent disagree on many discrete points (including the standard of review and the standard of proof). Many of these are essentially factual. Because they do not see the facts the same way, it is hard to compare the legal analysis. A key example is on the issue of what contract(s) had been made in Ontario. The majority is not overly satisfied that any contract had been, but is prepared to accept that Mr Sinclair's cardmember agreement was made in Ontario [102-103]. That contract is in a loose sense connected with the tort in Italy, but it is easy to see how one might think this is at best a very weak link [9]. In contrast, the dissent has no issue with the cardmember agreement having been made in Ontario [253, 259] and finds an additional contract also made in Ontario in respect of arranging the specific gondola ride [268]. That second contract is more closely linked to the tort and so the rebuttal analysis would be expected to differ from that relating to the cardmember agreement. The majority does not find any such second contract at all: it sees this as a reservation made to arrange that the gondola be available, which is not a separate contract but rather a part of the way Amex Canada performs its service obligations under the cardmember agreement [105-107].

The result of the appeal is highly fact-specific. But some useful general points can be extracted from the reasons. First, the decision may add to our understanding of the test for when a contract made in the forum is "connected" to the tort. In *Lapointe* (available here) the court had said that this is satisfied if "a defendant's conduct brings him or her within the scope of the contractual relationship" AND "the events that give rise to the claim flow from the relationship created by the contract" [58, 215]. I confess to having had trouble understanding what the former aspect means. What is it to be brought within the scope of the contractual relationship? Is this a factual or legal question? In what way would the Italian defendants be brought within the scope of the cardmember agreement (this does not seem possible) or even the second contract between Amex Canada and Carey International to arrange a gondola? Do they get brought within the scope just because they end up being the relevant gondola providers? Anyway, in this case, both the majority and the dissent seem to focus all of their analysis of whether the contract is connected to the tort on the second aspect: whether the tort "flows" from the earlier contract (a pretty easy test to meet here for all contracts involved) [128, 246].

Second, the judges engage in a lively debate about the standard of establishing a PCF. This is understandable given the extent to which they disagree about the facts. But their debate ends up being inconclusive. For the majority see [59] to [62] and the conclusion that this is not an appropriate case to develop the law on this point (so these paragraphs, then, are markers for arguments parties might make in future cases in which the law might be developed). For the dissent see [224] to [236] and the conclusion that what it considers the status quo on the issue remains the law (yet this is in dissent). There may be common ground, since in both discussions care is taken, at least in places, to refer specifically to the distinction between disputes about facts and disputes about the application of the law to those facts. A standard of proof, whether a balance of probabilities or a good arguable case, must be about facts and not law. It does not make sense to talk about the standard of proof for establishing a point of law or satisfying a legal test.

Third, few Canadian cases have provided a detailed analysis of how the rebuttal of a PCF works, so this case is most welcome on that specific issue. The majority offers some general considerations that feed into the analysis [67-72]. It also rejects the contention that rebuttal is a "heavy" burden on the defendant [74]. It calls the rebuttal "a shift in burden and perspective, not a shift in difficulty" [74, quoting the intervener BC Chamber of Commerce]. This language is likely be repeated quoted in subsequent decisions. The majority also says that the PCF and rebuttal stages work in tandem and are complementary [74-75]. This reflects the idea that if the PCF is broad, there should be more scope for rebuttal, and if the PCF is narrow, less so. The dissent does not disagree with this stated approach to the rebuttal analysis [see 217]. However, the judges disagree about whether the defendant's reasonable expectations of where it might be sued can be considered as part of the rebuttal analysis. The dissent says no [218, 291]. The majority says yes [71-72].

Finally, on the broader question of how willing courts should be to take jurisdiction over a defendant on grounds of efficiency, access to justice and avoidance of multiple proceedings, most comments from the judges are indirect. The majority stresses the importance of "fairness" to defendants [45]. It rejects "bootstrapping" and insists that a PCF must be shown for each defendant [63]. It cautions against a jurisdiction analysis that considers "the factual and legal situation writ large" [63]. In contrast, the dissent sees the proceeding as one that

“claims inseparable damages for these integrally related torts” [281] and rejects focusing on the collision as something separate from other facts and claims [249]. More directly, it states “[i]n a case alleging multiple torts, as in this case, or a case raising claims under multiple heads of liability, focussing on the dispute as a whole ensures that a court does not inappropriately hear only part of the case in the forum while leaving related claims to be heard in the extra-provincial or foreign court” [244]. In doing so it quotes the notorious para 99 of *Club Resorts* (available here), language that continues to trouble courts more than a decade later. After *Sinclair*, are we closer to a principled answer for cases with related claims against multiple defendants? By focusing on the narrow and specific questions raised by the particular PCF at issue, including identifying whether and where certain contracts were made, the broader debate is being conducted covertly rather than in the open.