Where Does The Internet Happen? The Supreme Court Of Canada Tackles The Thorny Issue Of Which Law Applies To Defamation Claims

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In its recent decision in *Haaretz.com v. Goldhar*, the Supreme Court of Canada has addressed the difficult question of which law should govern claims for internet defamation.

The issues before the Court on the appeal were whether Ontario: (i) had jurisdiction *simpliciter* over the plaintiff's defamation claim; and (ii) was the *forum conveniens* for that claim.

The plaintiff is a Canadian citizen who owns one of Israel's most popular soccer teams. The claim arose out of an article that appeared in the online version of the Israeli newspaper, *Haaretz*, which contained allegedly libellous statements about the plaintiff's management of his soccer team and his Canadian business practices. The plaintiff sued in Ontario.

All nine judges (with the possible exception of Abella J) agreed that Ontario had jurisdiction *simpliciter* over the claim. However, the majority of the Court ordered that the action be stayed on the grounds that Ontario was a *forum non conveniens* for the action, as it would be fairer and more efficient to try the case in Israel. Three judges (McLachlin CJ, and Moldaver and Gascon JJ) dissented and would have held that the case should be tried in Ontario.

While the *forum conveniens* determination is fact-driven and necessarily case-specific, the decision wrestled with one legal issue in particular that is likely to be of broader application. As part of the Court's analysis of which jurisdiction would be the most appropriate forum for the plaintiff's claims, the Court had to consider which law would apply. While none of the judges viewed the choice of law as determinative of where the case should be tried, they all opined on which law should apply, as a factor that might favour one jurisdiction over another (*i.e.* it might be slightly more convenient to try the case in the country whose laws would apply).

As the Supreme Court had previously noted in its seminal decision in *Tolofsen v. Jensen*, thorny choice of law issues arise when an act occurs in one place but its consequences are felt elsewhere. Defamation cases are particularly challenging in this regard. It is well-established that defamation occurs wherever the defamatory statements are published. This means that, in contrast to personal injury cases (where the tort occurs in the place where the injury is caused), defamation can occur simultaneously in numerous jurisdictions, because a person's reputation (in contrast to their body) is not damaged only where the person is located. The issue has been exacerbated by the advent of the internet, as Canadian courts have held that material is "published" wherever it is read or downloaded by someone other than the plaintiff or the publisher. As a result, an article posted on a website is literally published wherever internet access exists.

The Court in *Haaretz.com v. Goldhar* had to decide whether to apply the traditional *lex loci delicti* ("place of the tort") approach and hold that the law of every place where the plaintiff's reputation was damaged would apply to that portion of his claim, or whether, instead, a different test should apply to defamation claims.

- Two of the judges (Abella and Wagner JJ) held that it was time for a change. They would have applied a new test, pursuant to which defamation claims would be governed by the law of the single place where the plaintiff's reputation had sustained the most substantial harm. Applying this new test, they concluded that the law of Israel should govern the plaintiff's claim.
- Abella J would also have incorporated a "most substantial harm" test directly as part of the jurisdiction *simpliciter* and *forum conveniens* analysis.
- The remaining members of the Court either held that the *lex loci delicti* rule should continue to apply (McLachlin CJ, Moldaver and Gascon JJ) or that this was not an appropriate case in which to alter the existing test (Côté, Brown and Rowe JJ) or else did not discuss the issue (Karakatsanis J).

While the result of the case is arguably to maintain the *status quo*: that defamation claims will be governed by the law of the place of publication, the difference of opinions within the Court also demonstrates the challenges that defamation and, in particular internet defamation, will continue to pose to the application of traditional legal principles.

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