ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

Giustra v. Twitter, Inc., 2021 BCCA 466

British Columbia Court of Appeal, Groberman J, DeWitt-Van Oosten J, Grauer J, 10 December 2021

An appropriate forum appeal about an allegedly defamatory discussion on Twitter discrediting a philanthropist for his work with children.

Key words: Defamation, British Columbia, Canada, Twitter, Forum Non Conveniens, Comity

1. The written reasons were given by Grauer J.

2. Mr. Giustra resides in West Vancouver, British Columbia, and is a successful businessman. He is involved in numerous philanthropic organizations (The Radcliffe Foundation), including as President of the Giustra Foundation, and as a member of the Board of Trustees of the Clinton Foundation.

3. Mr. Giustra alleged that he was targeted by a group who vilified him on Twitter for political purposes in relation to the 2016 United States election as part of an orchestrated campaign to discredit him because of his charitable and philanthropic work in support of the Clinton Foundation.

4. Although Twitter removed some of the material, much of it remained, and he alleged that it damaged his reputation, specifically his involvement in children's charities, falsely characterizing him as a paedophile. He further claimed that the tweets were posted maliciously and that Twitter had acted in reckless disregard for the emotional distress suffered by him and his family.

5. Twitter applied for an order dismissing the action on the ground that the Supreme Court of British Columbia did not have jurisdiction over Twitter, or alternatively, staying the action on the ground that the Court should decline jurisdiction in favour of the courts of California.

6. The Primary Court found against Twitter on both issues, concluding that the Court had jurisdiction over the claim and should not decline to exercise it.

7. The Primary Court noted that under US federal law, any action brought against Twitter for defamation in the United States was doomed to fail, and any libel judgment obtained against Twitter elsewhere will not be enforced by the courts of California, or any other American jurisdiction.

8. The Communications Decency Act of 1996, 47 USC § 230, immunizes computer service providers like Twitter from liability for information that originates with third parties. US law does not protect the authors of the tweets from liability—if identified, they may still be sued in the United States.

9. Twitter appealed.

10. The issues before the Appeal Court were:

    a) Whether the relationship between British Columbia and the subject matter of the litigation was nevertheless so tenuous as to rebut the presumption of jurisdiction; and if not,
    b) Whether British Columbia should decline to exercise its jurisdiction on the ground that California was the more appropriate forum under a forum non conveniens analysis.[1]

Connecting Factor

11. Although Mr Giustra has a residence in and so a connection with California, his real and substantial connection was with British Columbia.

12. The Appeal Court explained (at [44]):

> Mr. Giustra's primary residence is in British Columbia, he has an established reputation in British Columbia, he is the head of businesses incorporated in British Columbia, and he is president of a philanthropic organization based in British Columbia. Taken together with his plea that the offending tweets have been published to a large audience in British Columbia, and have damaged his professional and personal reputation, a real and substantial connection between the case and British Columbia is revealed.

Foreseeability

13. The Appeal Court found that correspondence from Mr Giustra's lawyers to Twitter made it foreseeable that he, as a Canadian resident, would want to vindicate his Canadian reputation in a Canadian court.

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[1] Forum non conveniens (an inconvenient forum) is a common law legal doctrine where a court can acknowledge that another forum or court where the case might have been brought is a more appropriate venue for a legal case, and transfers the case to that forum. A change of venue might be ordered, for example, to transfer a case to a jurisdiction within which an accident or incident underlying the litigation occurred and where all the witnesses reside. As a doctrine of the conflict of laws, forum non conveniens applies between courts in different countries and between courts in different jurisdictions in the same country.

Evidentiary burden

14. Twitter argued that once a defendant sought to rebut the presumption of jurisdiction in a defamation case, that act alone imposed a burden on the plaintiff to lead evidence of harm to his reputation in his chosen forum.

15. The Appeal Court rejected this argument. It found that once the pleadings had established a presumptive connecting factor, then, in the absence of evidence from the defendant contradicting those pleadings, no further evidentiary burden was imposed on the plaintiff.

Conclusion on jurisdiction simpliciter

16. The Appeal Court was satisfied that Twitter had failed to rebut the presumption of a real and substantial connection based on the connecting factor of the tort having been committed in British Columbia.

Was California the more appropriate forum?

17. The purpose of forum non conveniens is to temper any potential rigidity in the rules governing the assumption of jurisdiction and to assure fairness to the parties and the efficient resolution of the dispute. Where the evidence indicates that the alternative forum is in a better position to dispose fairly and efficiently of the litigation, the court should grant the stay. This is especially true in cases where the evidence raises doubt as to whether proceeding in the chosen forum will provide the defendant with a fair opportunity to present its case.

18. The Primary Court held that Mr Giustra had close connections to British Columbia. British Columbia law would apply to tweets read in in that jurisdiction and there would be no breach of comity by this court assuming jurisdiction.[2]

19. Twitter argued on appeal that the Primary Court relied principally on one factor, the juridical disadvantage to Mr. Giustra of litigating in California, thereby rendering the remaining factors essentially irrelevant.

20. The Appeal Court was satisfied that the Primary Court had considered all of the appropriate factors in coming to its decision. There was no practical difficulty that would make holding the trial in British Columbia unfair to Twitter by reason of inconvenience and expense, at least as balanced by the unfairness to Mr. Giustra of being required to commence proceedings in California that could not succeed. The overarching requirement was to consider the interests of the parties to a proceeding and the ends of justice.

21. The Appeal Court dismissed the appeal.

[2] The legal principle that political entities (such as states, nations, or courts from different jurisdictions) will mutually recognize each other's legislative, executive, and judicial acts.

IMPLICATIONS

The forum non conveniens part of this decision was not controversial. Determining forum is always a matter of balancing the connecting factors to each jurisdiction against each other. In this case, the connecting factors to British Columbia outweighed those favouring California. In addition, the freedom of speech embedded in the US Constitution via its first amendment makes the pursuit of defamation proceedings of this type nugatory in the US.

Twitter was at pains to point out that should it be obliged to proceed to trial in British Columbia, it would raise the defence that, in law, it could not properly be considered a publisher of tweets read in British Columbia (or anywhere else) that it did not author or create.

The Australian High Court's decision in Fairfax Media Publications v Voller [2021] HCA 27 was handed down in September 2021. The Court held to an orthodox interpretation of “publication” under defamation laws and, in effect, rejected the argument made by the media company appellants that they should not be liable for defamatory posts on Facebook pages that they controlled, because they did not intend the material to be posted. The Voller decision shows that Australians who maintain a social media page may be exposed to defamation liability for defamatory comments posted on the page by others – even if they are not aware of those defamatory comments.

The Australian Government has developed the Social Media (Anti-Trolling) Bill 2021. It will empower Australians to 'unmask' the originators of anonymous defamatory comments made on social media, where comments are made in Australia. Where social media services establish and comply with a complaints scheme that allow the commenter's contact details to be disclosed with consent, or comply with court orders requiring them to provide contact details, the provider of the service will have access to a conditional defence from defamation liability. If the commenter cannot be identified, the Bill will enable victims to treat the provider of the social media service as a publisher for the purpose of potential defamation proceedings.

VIEW THE CASE

This case may be viewed at https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca466/2021bcca466.html

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