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SWINGING 60's EDITION

A Quarterly Newsletter
published by
Dutton Brock LLP
Summer 2012
Issue Number 41

I like to think of my behavior in the sixties as a "learning experience." Then again, I like to think of anything stupid I've done as a "learning experience." It makes me feel less stupid.
-P. J. O'Rourke

International Law of Mystery!

Supreme Court of Canada Outlines Applicable Test For Determining Jurisdiction in Civil Lawsuits

The next time that you travel for scuba in Cuba, you can rest easier knowing that in the event of a catastrophe, your loved ones won't face eight or nine years fighting about which jurisdiction can and should respond to their claim… probably.

In theory, a new level of certainty in the area of conflict of laws (a.k.a. private international law) was achieved in the recent, much-awaited decision of the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17. This decision arises from two cases which slowly wound their way through the Ontario courts before finally being heard by the Supreme Court last spring.

The main plaintiff in the eponymous case, Morgan Van Breda, suffered a devastating spinal cord injury on a beach in Cuba, when a piece of sports equipment collapsed while she was attempting to use it for chin-up exercises. The companion case, *Charron v. Bel Air Travel Group,* arose following the untimely scuba-related death of Claude Charron, a Pentanguishene-based physician.

The difficulties inherent in determining the jurisdiction for these complex multi-party actions arose from the organizing principles and objectives of the conflicts system. Order, fairness and comity underlie the process of determining jurisdiction; and order and fairness were heavily at odds in this case. The plaintiffs were individuals who had suffered terrible losses, and would potentially face a loss of juridical advantage, overwhelming expense and personal difficulty if the Ontario court found that it had no jurisdiction to hear the claim. Although the corporate defendants had fairness concerns as well, they championed a need for order, in the form of certainty and predictability. Why should a Cayman Island-based company managing a Cuban-owned resort be expected to defend itself in Ontario? The competing principles needed to be reconciled if justice was to be achieved.

The Court was asked to decide two questions: first, whether or not the Ontario courts were right to assume jurisdiction in these cases; and second, were they right to exercise that jurisdiction?

To address the first question, the Court reframed the test for determining whether or not the action has a real and substantial connection to the jurisdiction in question – in other words, the test to determine jurisdiction *simpliciter.*

Other Topics

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Rather than weighing fairness to the parties, efficiency or comity at this stage, the Court opted for a more objective, fact-based inquiry. This significant change should reduce the unpredictability and uncertainty associated with the exercise of judicial discretion that was inherent to the earlier approach to jurisdiction *simpliciter,* developed in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), and applied prior to *Van Breda.*

The goal of the new *Van Breda* analysis is to determine whether or not one or more presumptive connecting factors are present. Four factors were identified as a non-exhaustive list of connections which will presumptively entitle a court to assume jurisdiction:

1)the defendant is domiciled or resident in the province;
2)the defendant carries on business in the province;
3)the tort was committed in the province; and
4)a contract connected with the dispute was made in the province.

Under this new approach, the plaintiff bears the burden of presenting evidence to establish one or more of these factors, or of establishing a new presumptive connecting factor. If one or more connecting factors is proven, the Ontario court has jurisdiction over the litigation. If no presumptive factor - existing or new - applies, then the claim should not proceed in Ontario.

Although these connecting factors create a presumption, it is a rebuttable one. The defendant retains the ability to tender evidence which demonstrates that there is no real relationship between the action and the forum; or that the relationship is too weak to support the assumption of jurisdiction. For example, if the connecting factor is a contract made in the province, the presumption may be rebutted by showing that the contract is unrelated to the action. It is difficult to imagine rebutting the presumption created by the residential presence of the defendant, however; and nearly as difficult to conceive of a rebuttal when the tort occurred in the jurisdiction.

The last resort for the defendant is offered by the doctrine of *forum non conveniens*. If the defendant raises this issue, it has the burden of demonstrating to the court why the court should decline to exercise its jurisdiction. The defendant can meet this burden by calling sufficient evidence to identify another jurisdiction which is properly connected to the litigation, and to show why that forum is clearly more appropriate. This will be a difficult test to meet. Defendants should keep in mind, however, that the test for jurisdiction *simpliciter* may be met on a low threshold, and so the alternative forum argument may be worth making. Unlike the test for jurisdiction *simpliciter,* fairness and increased efficiency of proceedings will weigh heavily in this branch of the jurisdictional analysis.

Despite the increased level of certainty provided by this decision, there remains a great deal of fodder for future litigation. The possibility of defining additional connecting factors should singlehandedly keep jurisdictional arguments alive and kicking for years to come. The scope of "carrying on business" has yet to be defined, and the notion of how connected a contract must be to the dispute in order to fit the final category remains open for argument.

In the meantime, travel often, be safe, and always dive with a buddy.

Donna A. Polgar is an Associate developing a practice in insurance coverage and tort litigation matters. She was previously a Crown prosecutor.

YEAH, BABY, YEAH: COURT OF APPEAL RESTRICTS THE DEFINITION OF "ACCIDENT" UNDER THE SABS

In our December 2011 issue of e-Counsel, we detailed the decision in Personal v. Downer (2011), Carswell Ont 8469 (S.C.J.) where Justice Murray expanded the definition of "accident" under section 2(1) of the SABS to include a situation where a plaintiff is injured during an armed robbery that happens to occur while he is in his automobile. Since that time, the insurer in that case appealed and we're pleased to update you on the latest pronouncement on this issue from the Court of Appeal, which is found at Personal v. Downer (2012), ONCA 302.

Mr. Downer was the victim of an assault and attempted robbery where he allegedly suffered psychological and physical injuries. Justice Murray, on the original application before the Superior Court, granted a declaration that Mr. Downer was involved in an "accident" within the meaning of the Schedule. The Personal appealed the motion judge's decision and requested an Order declaring that Mr. Downer was not involved in an "accident", and an Order dismissing the plaintiff's claim.

LaForme J.A., writing for the Court of Appeal, initially considered whether the physical injuries caused as a result of the assault and subsequent attempt to seize the vehicle constituted an "accident". Justice Murray had, in his lower decision,

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determined the injuries caused to Mr. Downer were directly connected to the use and operation of his vehicle because they were caused by the assailants' purpose to seize possession and control of the automobile.

LaForme J.A. determined that the lower Court erred in its application of the causation test. In particular, Justice Murray erroneously referred to "ownership" in section 2(1) of the Schedule when it only referred to "use or operation". Justice Murray also failed to consider whether an intervening act outside the "ordinary course of things" resulted in the injuries. LaForme J.A. found that the assault on Mr. Downer was an intervening act analogous to the catastrophic gun shot wounds suffered by the insured in *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.). The Court of Appeal therefore concluded that the assault was not a normal incident of risk created by the use or operation of his vehicle. The plaintiff's injuries did not result from an accident as defined in the Schedule after all.

On the original motion, Mr. Downer also claimed that he suffered psychological impairments on the belief he may have run over one of the assailants. The Personal submitted on appeal that there was no independent evidence that Mr. Downer actually ran over anyone or that his psychological conditions were caused by this belief. LaForme J.A. disagreed with this position stating that Mr. Downer submitted evidence by affidavit in his motion record that he was very stressed and nervous after the accident. In addition, it was noted that the Personal did not ask the motion judge to decide the impairment issue on a summary basis nor was the Personal challenging the accuracy of Mr. Downer's evidence. LaForme J.A. acknowledged that psychological injuries may have resulted from this incident. However, it was found that this was a genuine issue requiring a trial on the basis of how the issues were framed at the summary judgment motion.

This decision will certainly bode well for insurers who are feeling increased pressure from what seemed to be the ever-expanding definition of "accident" in recent decisions. While the Personal was only granted appeal on one part, this helpful Court of Appeal decision re-confirms what seemed to be lost in the Superior Court that an insured's injuries must be directly caused from the use or operation of a vehicle.

Dilraj S. Sandhu is an Associate at Dutton Brock LLP. Mr. Sandhu is developing a broad insurance defence practice with a focus on first-party accident benefit claims.

Ooooh Behave: Plaintiff's Opening Submissions Struck - Twice

When it comes to opening statements, it seems the third time really is the charm - at least it was for plaintiff's counsel in Hoang (Litigation Guardian of) v. Vicentini, [2012] ONSC 1068 (SCJ).

Madam Justice Darla Wilson granted not one but two defence mistrial motions in this personal injury action following the experienced plaintiff counsel's inappropriate opening statements in both the first and second trials. In doing so, she provided a helpful review of the law governing the issue of when an opening statement in a jury trial may properly result in a mistrial.

The action was brought by Christopher Hoang following a motor vehicle accident that occurred on August 6, 2004 when he was six years of age. Christopher's father, Can Hoang, had asked Christopher to get out of the Hoang vehicle and to cross the street while he parked their car. As Christopher was crossing the street, his hat blew off and the child ran to retrieve it. At the same time, a vehicle driven by Adriano Vicentini tragically struck and injured young Christopher. Christopher brought an action in negligence against Vicentini and the elder Hoang.

In the first trial, plaintiff's counsel had yet to complete his opening address to the jury when defence counsel moved for a mistrial owing to several statements made by the plaintiff's counsel up to that point.

Wilson J. held that plaintiff's counsel made several inappropriate statements in his opening address that could not be remedied by a caution to the jury and, as such, declared a mistrial. In particular, the Court held that plaintiff's counsel had misstated the law on the reverse onus borne by defendants under the *Highway Traffic Act*. While plaintiff's counsel was correct to state that the Act imposed a reverse onus on Vicentini as a driver of a motor vehicle that had struck a pedestrian, the reverse onus did not apply to Can Hoang. The allegations against Christopher's father were framed in negligence for placing his son in a situation of danger by dropping him off and telling him to cross the street without proper supervision. While

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the reverse onus applied to Vicentini, it did not apply to Christopher's father.

Plaintiff's counsel also told the jury that the Vicentini vehicle's brakes had caused or contributed to the accident when there was no evidence to suggest that the brakes were a contributing factor. While the police mechanic had inspected the vehicle and found that there was little friction material on the right front brake, there was no evidence to suggest that the condition of the brakes played any role in the accident. To add to the controversy of counsel's references to Vicentini's brakes, Wilson J. had earlier ruled that the police mechanic was not entitled to give expert evidence regarding the brakes' condition.

The parties tried again before a new jury. Following plaintiff counsel's opening address in the second trial, the defendants brought another mistrial motion. It too was successful.

Wilson J. found that plaintiff's counsel inappropriately suggested that jurors occupy the role of "enforcer" of the law. The Court also took issue with plaintiff counsel's inaccurate statement that the police investigation was incomplete, as well as his suggestion that the jury was in a superior position to the investigating officers when deciding the facts of the accident.

Finally, plaintiff's counsel had again inappropriately referred to the condition of Vicentini's brakes. He asserted that Vicentini bore the reverse onus of showing that his brakes were in a suitable condition that the time of the accident, a position (quite rightly) held by Wilson J. to be incorrect in law.

After the plaintiff counsel's third opening statement passed muster, the trial was underway and the jury returned a verdict generally in favour of the defence. The jury found that Vicentini was not at fault for the accident. It found that Christopher's father was negligent for failing to properly supervise his son. General damages were awarded in the amount of $150,000 and over $680,000 was awarded for future medical care. In yet another interesting twist in this case, the jury awarded nothing for future loss of income or loss of earning capacity despite the significant awards on other headings.

It seems this jury trial was no day at the beach for plaintiff's counsel.

Jennifer Arduini is completing her articles with Dutton Brock LLP. She is joining the accident benefits department as an Associate after her call to the Bar this summer.

GROOVY DECISION FROM THE COURT OF APPEAL CLARIFIES THE LIMITATION PERIOD FOR COMMENCING LOSS TRANSFER

On April 5, 2012, the Court of Appeal released the eagerly awaited decision in Federation Insurance Co. of Canada v. Markel Insurance Co. of Canada, [2012] ONCA 218 with respect to the issue of when one insurer can commence private arbitration proceedings as against a second party insurer for loss transfer indemnification. Loss transfer claims are allowable pursuant to Section 275 of the Insurance Act, R.S.O. 1990, CI.8., which allows one insurer to claim reimbursement for accident benefit payments against an at fault insurer for different classes of vehicles as defined in the Regulation. Specifically, these are claims as against insurers of heavy commercial vehicles or motor cyclists who are at fault for the subject motor vehicle accident.

The three panel judge of the Ontario Court of Appeal which consisted of Justices Goudge, Sharpe and Blair was asked to

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consider the decision of Justice Edward Belobaba of the Superior Court of Justice dated July 12, 2011. Justice Belobaba was, in turn, hearing the appeal of two arbitral decisions cited as *Markel Insurance Company of Canada v. ING Insurance Company of Canada,* a decision of Arbitrator Lee Samis as well as the *Federation Insurance Company of Canada v. Kingsway General Insurance Company,* a decision of Scott Densem.

Both Arbitrators came to a different conclusion as to when a requesting insurer for loss transfer indemnification could commence private arbitration proceedings against the responding insurer. In the *Federation v. Kingsway General Insurance Company* case, Arbitrator Densem came to the conclusion that the limitation period to commence private arbitration proceedings begins to run the day after a Notice of Loss Transfer request for indemnification is served on the opposing insurer. Arbitrator Samis was of the view that the limitation period to commence private arbitration commences only after the responding insurer unequivocally refuses to accept the request for loss transfer indemnification. Essentially, this would require the responding insurer to either deny or omit to respond to the initiating insurer's request for loss transfer indemnification. On Appeal to the Superior Court of Justice, Justice Belobaba preferred the approach of Arbitrator Densem. In rendering its decision, the Court of Appeal agreed with Justice Belobaba and dismissed both appeals.

In arriving at their conclusion, the Court of Appeal reviewed the once applicable *Limitations Act*, R.S.O. 1990 (the "old *Limitations Act*") which allowed 6 years to commence proceedings. The Court also reviewed the leading case of *State Farm Mutual Automobile Insurance Company v. Dominion of Canada General Insurance Company* (2005), 79 OR (3d) 78. (CA). However, State Farm was decided under the old *Limitations Act* and not under the now-applicable *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B. (the "new *Limitations Act*").

It was not in dispute for purposes of the appeal that the new *Limitations Act* which came into effect on January 1, 2004, applies to loss transfer claims. The new *Limitations Act* prescribes a limitation period of two years from the date a claim is discovered unless some other period is specifically indicated. The Court of Appeal goes on to consider when a claim is discovered for purposes of commencing arbitration proceedings.

The parties in the Court of Appeal decision in *Federation v. Kingsway and Markel v. ING* agreed that the limitation period for loss transfer claims is two years. The only question asked of the Court was, "When is a loss transfer claim 'discovered' by the first party insurer to start the 2 year limitation period?"

The Court of Appeal preferred the approach of Arbitrator Densem, in stating "The limitation period begins the day after the first party insurer requests loss transfer rather than when the second party insurer denies it". The decision of Arbitrator Densem followed the reasoning of the State Farm case in concluding that the two year limitation period is a "rolling period". In essence, the first party insurer sustains a loss each time it submits a request for indemnification to a second party insurer and a separate limitation period applies to each loss transfer claim.

The Court of Appeal has therefore unequivocally stated that once the initiating insurer serves a request for loss transfer indemnification on a second party insurer, the first party insurer then has two years from the day **after** they serve the Notice on the other insurer to commence private arbitration proceedings under the *Arbitrations Act,* 1991, S.O. 1991, c. 17.

Dana R. Spadafina is an Associate who practice focuses primarily on the defence of first party accident benefits claims, loss transfer disputes and inter-company priority disputes.

Contest Winner

Jennifer Bethune of Gore Mutual Insurance was last edition's contest winner, correctly identifying Shaggy as the cartoon character voiced by Casey Kasam.

Congratulations Jennifer!!

Editors' note

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