Duncan (Litigation guardian of) v. Neptunia Corp.

Between
Alexander Duncan, by his Litigation guardian, Angelita Martinez, Angelita Martinez, in her personal capacity, and Tania Martinez, plaintiffs, and
Neptunia Corporation Ltd., San Miguel Corporation, San Miguel Brewing International Ltd. and San Miguel Bada (Baoding) Brewery Co. Ltd., defendants

[2001] O.J. No. 1441
Court File No. 99-CV-182360

Ontario Superior Court of Justice
B. Wright J.

Heard: March 13, 2001.
Judgment: April 18, 2001.
(107 paras.)

Counsel:

J. Gardner Hodder, for the plaintiffs.
Lise G. Favreau, for the defendants.

¶ 1 **B. WRIGHT J.**:— The defendants bring a motion to stay the plaintiffs' Ontario action. The stay is requested pursuant to rule 21.03(3)a) on the ground that the facts giving rise to the action have no real or substantial connection to Ontario and, therefore, Ontario courts have no jurisdiction.

¶ 2 The stay is also requested pursuant to rule 17.06(1)(b) on the ground that China is the more convenient forum for the trial.

¶ 3 Any judge faced with deciding these two issues faces a daunting task. The case law is in conflict: the concept of "real and substantial connection" is ill defined. The criteria for determining jurisdiction and the criteria for determining the more convenient forum are not the same but similar. (See Schedule attached). The concepts of jurisdiction and convenient forum are entwined.

¶ 4 The concepts of jurisdiction and convenient forum are supposedly separate and distinct concepts to be considered and kept in watertight compartments. However, a review of the cases displays how difficult it is to not let the compartments leak.

¶ 5 Which is the paramount concept, jurisdiction or convenient forum? We usually consider jurisdiction as paramount. If there is no jurisdiction that is the end of the matter.

¶ 6 However, as in this case, where damages are sustained by a plaintiff in Ontario, caused by a foreign defendant, should jurisdiction be paramount? Or, should it be assumed that both jurisdictions have jurisdiction and the paramount consideration, in the best interests of the parties, should be, which jurisdiction is the more convenient forum.

¶ 7 Perhaps in the struggle to separate jurisdiction and convenient forum, they were not intended to be separated. Perhaps, the entwined criteria should define which is the more convenient forum, which should be the paramount consideration. In other words, in what jurisdiction will justice be best served?

Facts

¶ 8 Mr. Duncan, an Ontario resident, entered into a two-year employment contract with the defendants to work at a plant in Baoding, China. The contract was from November 1, 1995, to October 31, 1997. The contract was extended for the period from November 1, 1997, to March 31, 1998.

¶ 9 One of the terms of the contract provided that the employer provide Mr. Duncan with furnished accommodation. On March 10, 1998, while residing in the furnished accommodation, Mr. Duncan was allegedly poisoned by gas leaking into the apartment.

¶ 10 Mr. Duncan was taken to a Baoding hospital and on March 12 was transferred to a Beijing hospital from which he was discharged on March 20. It seemed as though he had recovered; however, on April 3 and 4 he showed some signs of confusion and forgetfulness. On April 5 he returned to Ontario where his health deteriorated rapidly. He existed in a vegetative state in a nursing home where he died January 13, 2001.

Jurisdiction

¶ 11 The foreign defendants were served with the plaintiffs' claim pursuant to rule 17.02(h) which reads:

> 17.02. A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (h) Damage sustained in Ontario - in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence wherever committed.

History of the Rule

¶ 12 This ground for service ex juris was added in amendments to the Rules of Practice in 1975: O. Reg.106/75. In Vile v. Von Wendt (1979), 26 O.R. (2d) 513 (Div.Ct.), Linden J. writing for the court stated at p. 517:

> We are of the opinion that it was the intention of the Legislature, when it amended Rule 25(1)(h), to enable the people of Ontario to use their own Courts more easily to sue tort-feasors for damage sustained in Ontario, as a result of torts that were committed elsewhere: see John Ewing & Co. Ltd. v. Pullmax (Canada) Ltd. et al. (1976), 13 O.R. (2d) 587, 1 C.P.C. 251. Earlier decisions based on the old Rule had required Ontario residents to pursue foreign tort-feasors, such as negligent manufacturers, abroad, often causing considerable financial hardship to the victims: see Anderson v. Nobels Explosive Co. (1906), 12 O.L.R. 644; Paul v. Chandler & Fisher Ltd. (1923), 54 O.L.R. 410, [1924] 2 D.L.R. 479. The Legislature decided to remedy this situation by facilitating access to the Courts of Ontario. Consequently, our Courts should permit Ontario residents to sue for foreign torts where the facts can be fairly brought within the language of the Rule.

¶ 13 John Ewing & Co. Ltd. v. Pullmax (Canada) Ltd. et al., referred to in the above quotation, provides more background information on the amendments. Southey J. at p. 589 stated:

> Before the 1975 amendments, Rule 25 provided for a number of types of claims in respect of which service out of Ontario of a writ of summons or notice of writ might be allowed. The critical words of the Rule were: `Service out of Ontario ... may be allowed ...' and then the Rule specified a number of types of claims.
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> Rule 26 formerly read as follows:
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> > 26. An application to allow service out of Ontario may be made ex parte and shall be supported by an affidavit stating that in the belief of the deponent the applicant has a right to the relief claimed, and showing in what place or country the person to be served is or probably may be found, and whether he is a British subject or not, and that the case is a proper one for service out of Ontario under these rules.
>
> The effect of the 1975 amendment to the Rules is that an order for service outside the jurisdiction is no longer required. As there is no longer a need to apply for an order, Rule 26 containing the requirement for a supporting affidavit was repealed [O. Reg. 106/75, s.5]. The critical words of Rule 25 now read: `... a party to an action ... may be served out of Ontario ...' in the types of cases listed in the subclauses of the rule. The new rule gives a party an absolute right to effect service out of Ontario in the cases specified.
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> ...
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> Counsel for the applicant also referred to the concern expressed by the Courts in the cases decided under the Rules before 1975, with a reluctance to infringe

> the sovereignty of foreign states and with a requirement that the applicant show himself to be not only within the letter, but the spirit, of the Rules permitting service outside the jurisdiction. The judgments of the Court of Appeal and of McRuer, C.J.H.C. [[1948] O.R. at p. 325], in Empire-Universal Films Ltd. v. Rank, and the other authorities referred to therein, make it clear that these considerations were also matters which arose in connection with the exercise by the Court of the judicial discretion which it possessed under the old Rules.
>
> The weight to be attached to those considerations under the circumstances in which international and interprovincial business is now conducted has been questioned in recent cases. It appears that the persons enacting the 1975 amendments decided that such considerations should give way completely to the need for simplifying our procedure and avoiding time-consuming and wasteful interlocutory proceedings.

¶ 14 Based on the history set out in the above cases, the purpose of rule 17.02(h) was to facilitate the use of Ontario courts for actions based on damage sustained in Ontario, as a result of a tort, breach of contract, breach of fiduciary duty or breach of confidence that were committed elsewhere. The provision to allow service ex juris without leave was intended to simplify procedure and avoid unnecessary court proceedings. This change providing service without leave in many instances as well as the expansion of the list of grounds for service ex juris can both be argued to recognize the expanding "circumstances in which international and interprovincial business is now conducted", as referred to by Southey J. Our current era of "globalization" and internationalization, including such developments as growing numbers of free trade agreements and human rights treaties as well as the development of alien tort claim statutes and an international criminal court, would make that argument more relevant now than in 1976.

¶ 15 Rule 17.02(h) has been interpreted, quite simply, to confer jurisdiction in circumstances where damage was sustained in Ontario as a result of a tort, breach of contract, breach of fiduciary duty or breach of confidence wherever committed. In Vile v. Von Wendt, supra, Linden J. at p. 517 defined "damage" to include pain and suffering and financial loss, among other losses:

> The plaintiff Vile, although injured in Quebec as a result of a tort committed in Quebec, suffered damage in Ontario where he returned to the hospital for six months and to his home following the accident. Vile incurred medical expenses in Ontario; he underwent pain and suffering in Ontario and still does; he was deprived of many of the amenities of his life and is still being deprived of them; he suffered loss of wages and of business profits; and his partner also lost financially as a result of the injury. All of these items of damage were sustained in Ontario even though the accident and the initial damage occurred in Quebec.

¶ 16 Subsequent to the Divisional Court's decision in Vile v. Von Wendt, Poirier v. Williston (1980), 29 O.R. (2d) 303 (Div. Ct.) affirmed 31 O.R. (2d) 320 (C.A.) held that where a resident of Ontario is injured outside Ontario and returns to Ontario with pain, suffering, disability and

loss of ability to earn an income, he has sustained damage in Ontario. See also: Power v. Probert (1987), 19 C.P.C. (2d) 142 (Dist. Ct.) where it was held that personal injury damages suffered in Ontario are "sustained in Ontario" even though caused by an accident outside Ontario.

¶ 17 However, the defendants argue that sustaining damages in Ontario caused by a foreign defendant is not sufficient to confer jurisdiction on an Ontario court. In order for an Ontario court to exercise jurisdiction, the facts of the case must comply with the "real and substantial connection" test.

The "Real and Substantial Connection" Test

Morguard Investments Ltd. v. De Savoye

¶ 18 The issue in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 was whether a personal judgment validly given in Alberta against an absent defendant could be enforced in British Columbia where he then resided. The Supreme Court of Canada reviewed the law and history on the enforcement of foreign judgments. The court's analysis focused on the concept of comity between nations. The international context requiring a new analysis of the 19th century principle of territoriality was addressed by La Forest J. at p. 270:

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative.

¶ 19 Comity is the "informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory" (p. 268). La Forest J. expands on this brief description of the notion of comity by stating that it is "an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states" (p. 268). La Forest J. continues on pp. 268-9:

> For my part, I must prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in Hilton v. Guyot, 159 U.S. 113 (1895), at pp. 163-4, in a passage cited by Estey J. in R. v. Spencer (1985), 21 D.L.R. (4th) 756 at p. 759, 21 C.C.C. (3d) 385, [1985] 2 S.C.R. 278, as follows:
>
>> `Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. ...

¶ 20 The discussion of jurisdiction arose in Morguard since comity and fairness to the defendant required an assessment of whether or not the court had acted through a fair process: "the courts in one province should give full faith and credit ... to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action" (p. 273). The question then became whether or not the Alberta court had properly exercised jurisdiction. The central issue was identified by La Forest J. at p. 274 of the judgment and referred to in terms of the interprovincial, rather than international, context of the case:

> The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served ex juris. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service ex juris in all the provinces are broad; in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

La Forest J. then determines that the test for the proper exercise of jurisdiction is an assessment of a real and substantial connection between the jurisdiction and the action:

> It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it simply anachronistic to uphold a `power theory' or a single situs for torts or contracts for the proper exercise of jurisdiction. (p. 278)

Moran v. Pyle National (Canada) Ltd.

¶ 21 The Supreme Court in Morguard quotes from Dickson J. in Moran v. Pyle National (Canada) Ltd. (1973), 43 D.L.R. (3d) 239 (S.C.C.) in referring to the real and substantial connection test. The issue in Moran was the determination of the location where a tort had been committed. The plaintiffs were suing the manufacturer of a light bulb that allegedly caused Mr. Moran's death. The accident occurred in Saskatchewan. The defendant's manufacturing and assembling operations were based in Ontario and the United States and the defendant did not sell its products to consumers directly. The Saskatchewan Queen's Bench Act prohibited a plaintiff from bringing an action based on damages in respect of a tort committed outside the province unless leave of the court was granted. The Fatal Accidents Act permitted an action to be brought if the wrongful act, neglect or default would have entitled the person injured to maintain an action if death had not ensued. Because of the wording of these provisions, the right of the

plaintiff to maintain the action required a determination of the location of the commission of the tort.

¶ 22 In determining that the essence of a tort is the injury or wrong, and thus that a paramount factor in determining situs must be the place of the invasion of one's right to bodily security' (p. 248), Dickson J., for the court, found that the tort had been committed in Saskatchewan. The court thus held that the action fell within the provisions of the Fatal Accidents Act and the Queen's Bench Act and that the courts of Saskatchewan properly had jurisdiction. At pp. 250-251, Dickson J. implicitly applied the real and substantial connection test to determine jurisdiction, a broader approach than the place of acting or place of harm. The principle applied in the case was:

> Where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.

¶ 23 Professor Hogg in Constitutional Law of Canada, looseleaf ed., vol. 1 (Scarborough: Carswell, 1997) at pp. 13-16 limits this principle from Moran to the idea that "the occurrence of damage in a province is not by itself sufficient to subject an out-of-province defendant to the jurisdiction of the province's courts, but where it is accompanied by some business activity on the part of the defendant within the province", including indirect activity, "then the defendant may be subjected to the jurisdiction of the courts where the damage occurred".

¶ 24 It is interesting to note that in setting out the principle to be applied, Dickson J. emphasized that the "purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is the damage suffered" (p. 251). However, the injury in Moran was not ongoing. When the harm was caused by the light bulb, the damage was done simultaneously and Mr. Moran was killed. The specific nature of the fact situation is demonstrated by Professor Hogg's interpretation in the preceding paragraph. In Mr. Duncan's case, the damage caused by the gas leak continued and intensified in a different location than where the leak occurred. It is not clear that Dickson J.'s comments about the damage suffered should be understood to apply to this different fact situation. The context of product manufacturer's liability is not applicable to the Duncan case.

Hunt v. T. & N. plc

¶ 25 The real and substantial connection test presented in Morguard was applied by the Supreme Court in Hunt v. T. & N. plc, [1993] 4 S.C.R. 289. In Hunt, the plaintiff, a resident of British Columbia, was exposed to asbestos fibres in his work and suffered from cancer. He sued the defendant Quebec companies who manufactured the fibres. An application to strike the statement of claim and a challenge to the jurisdiction failed. When the plaintiff requested

production of documents, the defendants did not respond. Eventually, the plaintiff applied to the Supreme Court of British Columbia for an order compelling the production of the documents. The court held that the provisions of the Quebec Business Concerns Records Act provided lawful excuse under the British Columbia rules of court such that the defendants could refuse to comply with the request for documents.

¶ 26 The Supreme Court of Canada considered the constitutionality of the Quebec Business Concerns Records Act. The court determined that "[t]he problem in the end, then, involves issues of jurisdiction and whether that jurisdiction should be exercised" (p. 34). The constitutional validity of the Quebec statute was directly argued before the court. In its analysis, the court held that a province must respect the minimum standards of order and fairness addressed in Morguard when enacting legislation that may have some effect on litigation in other provinces. The "character of our constitutional arrangements" requires each province to give full faith and credit to judgments of the courts of other provinces. The court held that the considerations in Morguard are "constitutional imperatives" (p. 40) which are related to the determination of a proper exercise of jurisdiction.

¶ 27 La Forest J. emphasized that the real and substantial connection test form Morguard is undefined. At p. 41, he stated:

> In Morguard, a more accommodating approach to recognition and enforcement was premised on there being a `real and substantial connection' to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction. ... The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.

¶ 28 The reasoning in Hunt, indicates that a consideration of the constitutionality of legislation with extraterritorial effects involves a consideration whether jurisdiction was properly exercised. The proper exercise of jurisdiction is determined by the real and substantial connection test. La Forest J. stated (p. 42) that the principles guiding the application of the real and substantial connection test are order and fairness:

> Whatever approach is used, the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.

Tolofson v. Jensen

¶ 29 A little over a year after deciding Hunt, the Supreme Court released its judgment in Tolofson v. Jensen (1994), 120 D.L.R. (4th) 289. This case involved car accidents where injured

passengers brought actions in their home provinces rather in the province where the accident occurred and the defendant was resident.

¶ 30 In referring to the limits on the exercise of jurisdiction, La Forest J. wrote at p. 304:

> As Morguard and Hunt also indicate, the courts in the various states will, in certain circumstances, exercise jurisdiction over matters that may have originated in other states. And that will be so, as well, where a particular transaction may not be limited to a single jurisdiction. Consequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.
> To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extra-territorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a `real and substantial connection' (a term not yet fully defined) with the subject-matter of the litigation: see Moran v. Pyle National (Canada) Ltd. (1973), 43 D.L.R. (3d) 239, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586; Morguard, supra; and Hunt, supra. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of forum non conveniens a court may refuse to exercise jurisdiction where, under the rule elaborated in Amchem, supra (see especially pp. 111-13), there is a more convenient or appropriate forum elsewhere.

¶ 31 Morguard, Moran, Hunt and Tolofson all dealt with interprovincial matters. The nature of the Canadian federation and interprovincial mobility formed an important context for the decisions reached. However, it would seem logical that the test for an appropriate exercise of extraterritorial jurisdiction on the international level should be at least as high a standard as the test applicable between provinces.

Is the Real and Substantial Connection Test the Proper Test?

¶ 32 Is the real and substantial connection test the proper test in the context of rule 17.02(h)? From Morguard, Hunt, Tolofson, and the secondary sources noted below, the real and substantial connection test is relevant in determining the proper exercise of provincial jurisdiction for service ex juris. The annotation to rule 17.02 in Holmested and Watson, Ontario Civil Procedure. looseleaf, ed., vol. 2 (Toronto: Carswell, 2000) includes an "Author's note on the constitutional validity of the Rules re service out of the jurisdiction - What is the test to be applied?" Beginning at p. 17-8, the authors state:

> In Morguard Investments Ltd., above, the court raised (but expressed no opinion on) the question of whether or not there may be constitutional limits on the power of the provinces to pass rules providing for service out of the jurisdiction. Noting

> that the rules for service ex juris are broad, the court stated `that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province'. The court noted Professor Peter Hogg's suggestion that the constitutional limit might be one requiring a `substantial connection between the defendant and the forum province of the kind which makes it reasonable to infer that the litigant has voluntarily submitted himself to the risk of litigation in the courts of the forum province'. Mr. Justice La Forest stated `I must confess to find this approach attractive, but as I had noted earlier, the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue.' With the subsequent decision in Hunt v. T & N plc, [1993] 4 S.C.R. 289, it now seems clear that the Morguard principles are `constitutional imperatives' applying to the provincial legislatures and the courts. This raises sharply the question of what is the appropriate test to be applied in determining the validity of rules for service out of the jurisdiction. In general terms what appears to be required is a real and substantial connection between the province and the litigation or defendant. It is suggested that the exact nature of relevant test may be critical to the future effectiveness of the rules for service out of the jurisdiction.

¶ 33 Professor Hogg, Constitutional Law of Canada, supra, notes that the issue of constitutional limits on provincial extraterritorial competence is new and that provincial jurisprudence relating to issues with extraterritorial elements has developed with little regard to these limits. Professor Hogg writes at p. 13-14:

> [R]ules enacted or authorized by a provincial Legislature must come within the provincial legislative power over `the administration of justice in the province' in s. 92(14) of the Constitution Act, 1867. As the words `in the province' emphasize, the service ex juris rules must not exceed the territorial limit on provincial legislative power. It is not clear what that limit is. ... While the test has not been definitively articulated by the Supreme Court of Canada, it now seems clear that the constitutional rule of extraterritoriality requires that the only causes of action in respect of which service ex juris is available are those in which there is a substantial connection between the defendant and the forum province.

¶ 34 Holmested and Watson, supra, at p. 17-10, prefer the test of a substantial connection between "the adjudicating forum and the subject-matter of the action". The phrases "subject-matter of the action" and "damages suffered" are both used in Morguard in reference to the required connection. The wording requiring a connection between the defendant and the province is contained in a quotation from Professor Hogg at p. 278 of the Morguard decision.

¶ 35 Morguard's impact is addressed in J.-G. Castel, Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997). Castel identifies the overarching issue as one of the limits on extraterritoriality. At p. 51, he writes:

> The Constitution of Canada does not confer upon the provinces the power to legislate extraterritorially. Therefore, territoriality can be used as an instrument of constitutional control over provincial laws that have a significant impact outside the province. The courts of a province exercise jurisdiction over nonresident or absent defendants by serving them ex juris. This practice is valid under section 92(13) of the Constitution Act with respect to matters falling within the legislative competence of the provinces. When the subject matter of the proceedings is not within the provincial legislative competence, judicial jurisdiction may still exist if it involves the `administration of justice in the province' which is a head of provincial legislative power under section 92(14) of the Constitution Act. A province must have a substantial provincial interest to protect in order to subject a nonresident to its legislative and judicial jurisdiction.

Castel then examines the "constitutional limits to the exercise of jurisdiction against person outside the province". At p. 54, he states that:

> In Hunt v. T. & N. plc, the Supreme Court of Canada gave constitutional status to the principles expounded in Morguard. Therefore, the requirement of `a real and substantial connection' has become the absolute constitutional limit on the power of each province to confer judicial jurisdiction on its courts. ... The requirement of a real and substantial connection places a limit on the provincial rules of procedure since the provincial power to legislate with respect to service in juris or ex juris requires some serious contacts with the province.

¶ 36 The British Columbia Court of Appeal in Jordan v. Schatz (2000), 77 B.C.L.R. (3d) 134 (B.C.C.A.) at p. 140 has held that the real and substantial connection test must be applied to determine jurisdiction:

> Whether or not jurisdiction exists is based on the application of the `real and substantial connection' test. Prowse J.A. in Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C. (1997), 143 D.L.R. (4th) 213 (B.C.C.A.) states the test as follows, at p. 219:
> It is common ground that the test to be applied in determining whether the B.C. Supreme Court has jurisdiction over these proceedings is whether there is a real and substantial connection between the court and either the defendant (respondent firm) or the subject-matter of the litigation (occasionally referred to in the authorities as the `transaction' or the `cause of action'). Jurisdiction founded on this basis is referred to as `jurisdiction simpliciter'.

¶ 37 Several cases since Morguard have held that the real and substantial connection test must be considered when considering a motion to set aside service ex juris under rule 17.02(h). The difficulty with these cases is that none of them clearly explain the basis on which they are applying this test and whether they are considering the constitutionality of rule 17.02(h) as a

whole or finding that the circumstances of the case before them no longer fits under rule 17.02(h) given the real and substantial connection requirement.

Recent Decisions Requiring a Real and Substantial Connection under Rule 17.02(h)

¶ 38 Several Superior Court of Justice decisions have applied the real and substantial connection test in the context of rule 17.02(h). These decisions are briefly summarized below. A Manitoba decision applying the real and substantial connection test to a rule similar to Ontario's rule 17.02(h) is also reviewed.

¶ 39 Cunningham J. held in MacDonald v. Lasnier (1994), 21 O.R. (3d) 177 (Gen. Div.) that although the plaintiff's claim clearly fit within rule 17.02(h), the Supreme Court's decision in Morguard requires a "real and substantial connection". The decision stated that there was not a sufficient link between pain and suffering endured in Ontario and the actions of the defendants in Quebec. The lack of a real and substantial connection appears to amount to an assertion that the interpretation of "damage" in Vile such that it includes pain and suffering in Ontario has "dramatically opened the door to lawsuits in Ontario dealing with tortious conduct in a foreign jurisdiction" (p. 181). Morguard has placed limits on such actions in requiring a real and substantial connection and pain and suffering in Ontario does not meet this test. In the end, the court stayed the action for lack of jurisdiction.

¶ 40 The constitutionality of rule 17.02(h) was not argued in MacDonald. The court's reasoning focused on the legality of interpreting damage to include pain and suffering. As noted by Castel in Canadian Conflict of Laws, supra, at p. 55 note 25, the decision to stay the action rather than dismiss it implies that rather than holding that rule 17.02(h) is unconstitutional, meaning Ontario courts do not have jurisdiction over actions relating to damage suffered in Ontario, the ruling is an interpretation of the rule such that it does not include pain and suffering in Ontario.

¶ 41 Binks J. in Long v. Citi Club, [1995] O.J. No. 1411 (S.C.J.) simply cites a list of cases that have required a real and substantial connection and states that the plaintiff "must do more than allege that he has suffered damage in the forum province". The judge asserts that the real and substantial connection must be between "Ontario and the defendant, such that it makes it reasonable to infer that the defendant has voluntarily submitted himself or herself to the risk of litigation in the courts of the forum province". Given the interpretations of the real and substantial connection test in Morguard and the secondary authorities noted below, it is clear that a real and substantial connection between the forum province and the subject matter of the litigation, not necessarily the defendant, is sufficient to meet the test.

¶ 42 Jean-Jacques v. Jarjourai, [1996] O.J. No. 5174 (S.C.J.) relies directly on MacDonald. Mètivier J. first lists the many connections between the defendant and Quebec, then considers the issue of the plaintiff's pain and suffering in Ontario. Without further explanation, the court states: "Applying the `real and substantial connection' test to the facts herein and considering all factors, I find no such real and substantial connection exists between this action and the province of Ontario." This decision is not helpful in determining how the court applied the real and substantial connection test. The list of the defendant's connections with Quebec makes the test

look like a balance of the connections with Quebec and the connections with Ontario, a process more suitable to the consideration of most convenient forum.

¶ 43 Swinton J. in Leufkens v. Alba Tours International, [2001] O.J. No. 644 held that Morguard has changed the law and that cases relying on rule 17.02(h) before the Morguard decision are no longer to be followed. Swinton J. refers to Morguard, Moran, Hunt and Tolofson in reasoning that there is a distinction between jurisdiction and the doctrine of forum non conveniens and that jurisdiction is to be determined by assessing whether there is a real and substantial connection between the forum and the subject matter of the litigation (paragraph 15). At para. 29, she follows the cases that hold that the mere fact that the plaintiff continues to suffer damages in Ontario after sustaining an injury as a result of a tort committed outside the jurisdiction does not create a real and substantial connection between Ontario and the action.

¶ 44 There is also the case of Lemmex v. Bernard (2000), 49 O.R. (3d) 598 (S.C.J.), in which it was held that the third parties were properly served without leave pursuant to rule 17.02(h). McKinnon J. cites Morguard and purports to apply the real and substantial connection test; however, McKinnon J. does not distinguish between the test for jurisdiction and the assessment of the most convenient forum. The real and substantial connection test is held to involve as assessment of "what is reasonably in the contemplation of the foreign supplier, be it of goods or services". He then finds that it was reasonably in the contemplation of an independent contractor providing tour services in Grenada that a North American may suffer serious injury in the event of a bus accident in Grenada. The Divisional Court has granted leave to appeal the decision of McKinnon J.: (2000), 51 O.R. (3d) 164. In her reasons for granting leave, Aitken J. refers to the blending of the tests for jurisdiction simpliciter and forum non conveniens (p. 173). The decision is also criticized for addressing what was in the reasonable contemplation of the service providers without any evidence on that point (pp. 175-176).

¶ 45 These decisions provide little explicit reasoning as to why rule 17.02(h) is being interpreted to exclude pain and suffering in Ontario and other damages such as loss of income and medical expenses. MacDonald is cited as the source for this interpretation in Leufkens and in Jean-Jacques.

¶ 46 Although in the Macdonald, Leufkens and Jean-Jacques cases the courts found that Ontario did not have jurisdiction because the "real and substantial connection" test had not been met, I suggest the more important finding in all three cases was that the foreign jurisdiction was the more convenient forum.

¶ 47 The most recent Ontario case is 12248671 Ontario Inc. v. Michael Foods Inc., 51 O.R. (3d) 789. Aiken J. puts a different slant on the issue of jurisdiction.

¶ 48 Aiken J. states that where damage is sustained in Ontario, rule 17.02 authorizes service ex juris. However, if it is shown that the real and substantial connection test has not been met then Ontario should "decline" jurisdiction. If the real and substantial test is met Ontario would also "decline" jurisdiction if Ontario was not the more convenient forum.

¶ 49 In my view the cases since Morguard with respect to the real and substantial connection test deal with jurisdiction simpliciter and not the "declining" of jurisdiction.

¶ 50 Aiken J.'s interpretation of the real and substantial connection test is not helpful to an Ontario plaintiff. The plaintiff would go to the expense of serving a claim on a foreign defendant plus the cost of a motion to set aside the service ex juris only to find that the Ontario court decided to "decline" jurisdiction.

¶ 51 In the Michael Foods case Aiken J. found that the real and substantial connection test was met and that Ontario was the more convenient forum. Aiken J. uses some of the same factors in deciding the real and substantial connection test to decide that Ontario was the more convenient forum. This points up the difficulty in separating the issue of jurisdiction from the question of which jurisdiction is the more convenient forum.

¶ 52 A Manitoba case, Negrych v. Campbell's Cabins (1987) Ltd. (1997), 119 Man. R. (2d) 216 (Q.B.), also excludes such damage under Manitoba's rules and also cites MacDonald. The Manitoba Queen's Bench Rule 17.02(h) reads:

> A party to a proceeding may, without a court order, be served outside Manitoba with an originating process, ...
> (h) in respect of loss or damage sustained in Manitoba arising from any cause of action, wherever committed; ...

In the decision, Morse J. stated, starting at para. 6:

> There is no question in my mind that, in this case, however the term `real and substantial connection' may be defined, Manitoba has no real and substantial connection with the subject matter of the lawsuits commenced in Manitoba. The liability issue has absolutely no connection with Manitoba. The only connection between the plaintiffs and Manitoba is that the plaintiffs live in Manitoba and that the two injured plaintiffs have endured pain and suffering here and have received, and continue to receive, medical treatment in Manitoba. Apart from these two factors, the real and substantial connection with the subject matter of the lawsuits is with the Province of Ontario. It is there the accident occurred, the defendants live there, and the alleged wrong is governed by the law of Ontario.
> ...
> In Ontario, similar, although more restrictive, wording has been held to permit actions to be brought by Ontario residents in Ontario where the only linkage is that the plaintiff endured pain and suffering in Ontario - see MacDonald v. Lasnier (1994), 21 O.R. (3d) 177 at 181.

¶ 53 In the Divisional Court's decision granting leave to appeal in Lemmex, supra, at p. 174, the court acknowledges the decisions that hold that pain and suffering and medical expenses are

insufficient for a real and substantial connection:

> The second ground under s. 62.02(4)(a) [the Rules of Civil Procedure state on what grounds leave to appeal may be granted] relied on by Huggins and Bernard is that McKinnon J. decided Ontario had a real and substantial connection to the subject matter of the action based only on the fact that the plaintiffs are resident in Ontario and continue to suffer damages in Ontario, and there are cases both in Ontario and elsewhere in Canada which state that these factors are insufficient to establish jurisdiction in the forum. The cases of MacDonald v. Lasnier, supra; Long v. City Club, supra; Jean-Jacques v. Jarjura, supra, and Negrych v. Campbell's Cabins (1987) Ltd., supra, to which I was referred by counsel for Huggins and Bernard, taken at their highest, stand for the proposition that the mere presence of a plaintiff in a forum and the fact that the plaintiff is allegedly continuing to suffer pain and suffering in that forum or is continuing to receive medical treatment in that forum for an injury sustained elsewhere is insufficient to create a real and substantial connection to that forum justifying the assumption of jurisdiction in an action relating to the injury.

¶ 54 There are recent decisions released after the Supreme Court of Canada's decision in Morguard that continued to follow the reasoning of our Court of Appeal in Poirier v. Williston and did not mention Morguard. The Poirier case decided that where sufficient damages were sustained in Ontario, the rules for service ex juris conferred jurisdiction. The only remaining question was which jurisdiction was the more convenient forum. The cases which appear to follow Poirier are:

* Giles v. Arnold Palmer Motors (1991) 5 O.R. (3d) 536 (Gen. Div.) where Houston J. quoted extensively from Poirier in explaining rule 17.02(h);
* Trepanier v. Kloster Cruise Ltd. (1995), 23 O.R. (3d) 398 (Gen. Div.) where Hockin J. stated "I need not concern myself with the question of setting aside service. The plaintiff was entitled prima facie to effect service on Kloster in Florida pursuant to rule 17.02(h).";
* Dunlop v. Connecticut College (1996), 50 C.P.C. (3d) 109 where in finding that the injured plaintiff clearly fell within the provisions of 17.02(h), McGarry J. cited the decisions in Vile, Trepanier and Poirier, supra, in holding that damage includes "the various heads of damage and expenses that may be suffered as a result of tortious conduct";
* Sidiropoulos v. Johnson, [1996] O.J. No. 17 where the court disposed of the jurisdictional issue by simply stating that "the basis of the court's jurisdiction is established by Rule 17.02(h) as interpreted by the Divisional Court in Poirier v. Williston (1980) 29 O.R. (2d) 303."

¶ 55 Swinton J. in Leufkens, supra at para. 14, states that Trepanier and Dunlop deal exclusively with the issue of convenient forum, not jurisdiction. These decisions did deal with jurisdiction in their findings that the claims fell within rule 17.02(h). It would seem that Swinton

J. is making the same point that she makes in reference to Vile: that the court did not consider jurisdiction simpliciter. Based on this argument then, any of the cases that address the jurisdictional issue only in terms of the parameters of rule 17.02(h) cannot be followed since they did not consider the real and substantial connection test.

If the Real and Substantial Connection Test is the Proper Test, Can it be Applied in a Manner Consistent with the Interpretation of Rule 17.02(h) in Poirier v. Williston?

¶ 56 The real and substantial connection test is undefined. All the decisions that hold that rule 17.02(h) must be interpreted so as not to include only pain and suffering and expenses in Ontario are Superior Court level decisions - there is no higher court authority on the application of the real and substantial connection test in relation to rule 17.02(h). Holmested and Watson have emphasized the importance of the interpretation of the real and substantial connection test for its impact on rule 17.02: "It is suggested that the exact nature of relevant test may be critical to the future effectiveness of the rules for service out of the jurisdiction".

¶ 57 Castels, Canadian Conflict of Laws, supra, maintains that the proper test for jurisdiction, in either interprovincial or international matters, is the real and substantial connection test. His interpretation of this test includes an assumption that most of the provincial rules allowing service ex juris have a minimal connection with the province and that this will be sufficient to meet the test. He states at p. 55:

> The real and substantial connection to the province or territory when its courts exercise jurisdiction over litigants, a test designed to give substance to order and fairness, is neither very demanding, nor should it be applied rigidly, although there must be limits on claims to jurisdiction. In Morguard, the Supreme Court refrained from determining these limits as no court can anticipate what constitutes a reasonable assumption of jurisdiction. Traditional rules of jurisdiction are a good place to start. Each one must be defined in accordance with the broad principles of order and fairness. This approach is a constructive one. However, it should not be restricted to interprovincial litigation. The Supreme Court speaks of a real and substantial connection, not the most real and substantial connection, therefore a minimal connection with the province may be sufficient as long as it is not superficial. This is certainly the case with respect to most of the statutory rules of procedure allowing service ex juris in specific cases. For instance, it would seem that a breach of contract of a tort committed in the province is such a minimal connection. Only in cases not specifically listed in the rule of court, for which leave must be obtained, could service ex juris be seriously challenged on constitutional grounds if there was no connection at all with the forum. This is unlikely to happen in such a case, since the court would not grant leave to serve the defendant ex juris.

¶ 58 Castel then notes that the defendant can "invoke the discretionary power of the court to decline jurisdiction or stay the proceeding on the basis of the doctrine of forum non conveniens". The defendant is not necessarily bound to defend the action in the province

because of the court has jurisdiction over the matter. On a proper motion, the court will consider whether the defendant's jurisdiction is a more appropriate forum or other reasons for setting aside service or refusing jurisdiction under rule 17.06.

¶ 59 Frymer v. Brettschneider (1994), 19 O.R. (3d) is a decision that focuses on the issue of convenient forum. However, at p. 65 in the decision of Weiler J.A. (dissenting in part), there is a mention of Rule 17 where it is stated that "[t]he subjects listed in rule 17.02 have a connection with Ontario, i.e., real property in Ontario, residence and personal property in Ontario, a contract made or breached in Ontario, or damage sustained in Ontario". Arbour J.A. (McKinlay J.A. concurring) did not refer to or disagree with Weiler J.A.'s comments regarding rule 17.02.

¶ 60 These sources indicate that there may be some room to interpret rule 17.02(h) as consistent with a real and substantial connection with Ontario.

¶ 61 The Supreme Court in Hunt at p. 41 stated that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction". That decision also states that "[w]hatever approach is used, the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections" (p. 42).

¶ 62 Moran emphasized the important interest a State has in injuries suffered by persons within its territory (p. 250). The Supreme Court in Morguard was concerned about protecting defendants from being pursued in jurisdictions having little or no connection with the transaction or the parties principles of order and fairness, but damage suffered in Ontario does not necessarily have little or no connection.

¶ 63 In interpreting the real and substantial test, Swinton J. in Leufkens, supra at para. 18, refers to the decision of the British Columbia Court of Appeal in Jordan v. Schatz, supra, at pp. 140-141, as providing guidance on what is necessary to satisfy the test. While Swinton J. goes on to hold that pain and suffering, medical expenses, and loss of income in Ontario are not sufficient to establish a real and substantial connection, the British Columbia Court of Appeal, in the passage she cites, suggests that damages suffered in the province may be sufficient:

> What constitutes a `real and substantial connection' has not been fully defined. However, it has been well established by this Court in Nitsuko, supra, and in Ell, supra, that there is no real and substantial connection to British Columbia based on the bare residency of the Plaintiff in the jurisdiction. There must be some other or further sufficient connecting factor or `contacts' to this province. Clear examples of connecting factors include the residency of the defendant in the jurisdiction or the fact that the tortious act was committed or damages suffered here. [Emphasis added.]

¶ 64 There is also the decision of the Nova Scotia Court of Appeal in Oakley v. Barry (1998), 166 N.S.R. (2d) 282 (C.A.). In that case, while the plaintiff lived in New Brunswick, she

received treatment from the defendant physicians and hospital. They performed a liver biopsy and told her that she suffered from infectious hepatitis "B". Then she moved to Nova Scotia where physicians told her that she did not suffer from that illness. Within six years of moving to Nova Scotia, she brought an action for damages against the defendants in that province. They brought an application to set aside the plaintiff's originating notice on the ground that Nova Scotia lacked jurisdiction to decide the issue. The defendants had no connection with Nova Scotia, but the plaintiff did in that she received extensive medical care and social assistance in that province and her family and other support persons lived there. The judge of first instance dismissed the application. The physicians sought leave to appeal.

¶ 65 The Court of Appeal held that Morguard should be applied "in a flexible manner" and found that there was a real and substantial connection in the circumstances of the case. Pugsley J.A. concluded at p. 698-699 that:

> The jurisdictional test applied to determine whether there is a real and substantial connection between the appellant physicians and Nova Scotia should not be rigidly applied. ...
> The concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent [plaintiff], as well as the appellants [defendants].

Assuming that the jurisdictional issue is resolved, the question of the more convenient forum must be addressed.

The Real and Substantial Connection Test and the Factors for Convenient Forum

¶ 66 The cases hold that there will be some overlap in considerations, but that the two issues must be kept separate.

¶ 67 Aitken J. in Lemmex v. Bernard (2000), 51 O.R. (3d) 164 (Div.Ct.) granting leave to appeal of the decision of McKinnon J., notes that that tests are considered separate. She stated at p. 173:

> It has been held that the tests to apply in determining jurisdiction simpliciter and forum non conveniens are different (Ell v. Con-Pro Industries Ltd., [1992] B.C.J. No. 513 (Quicklaw) (C.A.)); though it has also been held certain factors are properly considered under both headings (Oakley v. Barry (1998), 166 N.S.R. (2d) 282, 158 D.L.R. (4th) 679, [1998] N.S.J. No. 122 (Quicklaw) (C.A.)). Certainly the language used by La Forest J. in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 regarding `real and substantial connection' is very similar to the language used by Arbour J.A. in Frymer v. Brettschneider (1994), 19 O.R. (3d) 60 at p. 79, 115 D.L.R. (4th) 744 (C.A.), where she states that the choice of forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action

and the parties.

¶ 68 Swinton J. in Leufkens also emphasized that the tests should not be blurred. However, she did note that the factors to be considered have some overlap. At para. 32 Swinton J. wrote: "Clearly, there is significant overlap between the factors considered with respect to jurisdiction simpliciter and forum non conveniens".

¶ 69 The Nova Scotia Court of Appeal keeps the tests for jurisdiction and convenient forum separate, but comments on the fact that some of the same considerations may have to be addressed. In Oakley v. Barry, supra, Pugsley J.A. writing for the court stated at p. 693-694 that:

> I agree with Professor Blom, in his reference to the `open-endedness of the Morguard formula' (at p. 393) and his comment that in trying to determine the meaning of order and fairness, in a jurisdiction simpliciter case, it may be necessary to take into account factors normally considered in a forum non conveniens case `in order to avoid injustice' (p. 387).

In his conclusion to the decision at p. 699, Pugsley J.A. wrote:

> The concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent, as well as the applicants. While this issue, as well as the issue of juridical advantage, are matters that are usually considered on a forum non conveniens issue, it is appropriate and relevant to consider them in this case involving jurisdiction simpliciter.

Convenient Forum

¶ 70 On a motion to stay a proceeding on the basis of forum non conveniens, the test is whether there is clearly a more appropriate jurisdiction in which the case should be tried than the forum chosen by the plaintiff.

¶ 71 In determining which forum, domestic or foreign, is the more appropriate forum, the courts will look at a wide range of factors. In Eastern Power Ltd. v. Azienda Communale Energia and Ambiente (1999), 178 D.L.R. (4th) 409, our Court of Appeal approved of a number of factors:

1. the location where the contract was made;
2. the applicable law of the contract;
3. the location where the majority of the witnesses reside;
4. the location of key witnesses;
5. the location where the bulk of the evidence will come from;
6. the jurisdiction in which the factual matters arose;
7. the residence or place of business of the parties; and

8. the loss of juridical advantage.

¶ 72 I will discuss various factors in relation to the facts of this case but will combine some of the factors.

Location Where Contract Made

¶ 73 Although some of the negotiations leading up to the employment contract took place in Ontario, the final negotiations took place in China where the final contract was signed and performed. Mr. Duncan was paid in Hong Kong Dollars.

Applicable Law of the Contract

¶ 74 Mr. Duncan entered into an agreement to provide services in China and to live there for over two years. It seems reasonable for the parties to expect that issues of negligence and breach of contract would be addressed pursuant to Chinese law. However, an Ontario court could apply the relevant Chinese law.

Location of the Witnesses

¶ 75 With modern technology, this factor is not as important as in previous cases. It is no longer necessary to bring witnesses half-way around the globe to testify. Live video testimony is proving to save expense and inconvenience.

¶ 76 I expect that liability will be the main issue in this litigation. Expert evidence as to the proper installation and inspection of gas lines and gas detectors would likely come from persons familiar with the gas system in Baoding, China. The defendants have not named specific witnesses with respect to the liability issue.

¶ 77 With respect to the issue of liability the plaintiffs indicate that they would call Helen Zhongyang as a witness. She is a professional engineer, originally from Baoding, and now residing in Toronto. She was a member of Mr. Duncan's staff in Baoding. The plaintiffs say that she can give evidence about how the local population in Baoding typically install and operate their residential gas service. She should also be able to comment on the Chinese language markings on the gas equipment in the building where Mr. Duncan resided.

¶ 78 The plaintiffs propose calling witnesses who lived in the same apartment building as Mr. Duncan and who also experienced gas leaks. The O'Brians lived in the same apartment building and were exposed to a gas leak in 1997. The O'Brians live in Washington State.

¶ 79 Ms. Ilian Chan lived in the same apartment building and discovered a gas leak. Ms. Chan lives in Manila, Philippines.

¶ 80 Ms. Navarro and Mr. Tobias lived in the same apartment building. They have indicated that on the night that Mr. Duncan became ill their gas detectors sounded. Both persons live in Manila.

¶ 81 It appears that Mr. Duncan's damages were caused by a gas leak. His most debilitating damages were sustained while in Ontario. The plaintiffs have indicated seven or eight persons who were involved in treating Mr. Duncan. All of the important medical witnesses reside in Ontario.

¶ 82 It would appear that the bulk of the evidence would come from witnesses who reside outside of China.

Loss of Juridical Advantage

¶ 83 The factual matters arose in China. The plaintiffs reside in Ontario. The defendants' registered offices are in different places. SMC has its registered office in the Philippines. SMBIL has its head office in the British Virgin Islands with a registered office in the Philippines. SMBBB is registered in the People's Republic of China and is located in Baoding City. Neptunia is a Hong Kong company.

¶ 84 It is not clear, if the plaintiffs' claims were adjudicated in China, whether the case would be heard in the People's Republic of China or in Hong Kong.

¶ 85 It is also not clear whether, if in China, the case would go directly to a court or would first have to be heard by the Labour Arbitration Commission with a review by a court.

¶ 86 It may be that the plaintiffs would lose a juridical advantage if their case is required to be heard in China.

Other Factors

¶ 87 I do not consider the factors outlined in the Eastern Power case to be exhaustive. Each case must be decided on its particular circumstances.

¶ 88 The court should look at the circumstances of the parties. In this case the plaintiffs have lost the love and support of a husband and father. The plaintiffs have limited financial resources. To retain counsel in China and to pay travel expenses to China for mother and daughter and to arrange for witnesses to attend in China would be prohibitive.

¶ 89 Daughter Tania is 20 years old and attends York University. Her life and schooling may be interrupted if she has to attend in China for a trial. It may not just be the trial but possible appeals which could mean several trips to China.

¶ 90 In the circumstances of this case, if a proceeding must take place in China, it is likely that the plaintiffs would have to abandon their claims. That would not be the case for the defendants if they are required to present their defence in Ontario.

¶ 91 The defendants are multi-national corporations. Financial resources to defend the action in Ontario would not be a problem. No individual employee of the defendants would suffer

inconvenience by coming to Ontario to defend the action. The defence of the Ontario action would, for the defendants, simply be part of doing business in a global economy.

¶ 92 The court should not only consider the most convenient forum for the parties to have the case heard but should also take into consideration fairness and justice to the parties and to the process.

¶ 93 No real prejudice would be suffered by the defendants having to defend the action in Ontario, but the plaintiffs would suffer substantial prejudice by having to proceed with their claims in China.

¶ 94 Since it is the plaintiffs who must prove their case, the court should lean toward favouring the plaintiffs' forum. Having considered all of the factors, I find that the defendants have failed to show that China is clearly a more appropriate jurisdiction in which the case should be tried than the forum chosen by the plaintiffs.

Conclusion

¶ 95 Rule 17.02(h) provides that where a plaintiff sustains damages in Ontario, the plaintiff may, without leave of the court, serve a claim on a foreign defendant.

¶ 96 It seems odd that a plaintiff can commence an action in Ontario, go to the expense of serving the claim on the foreign defendant, and the foreign defendant go to the expense of moving for a stay in Ontario, only for the plaintiff to find that the claim should not have been commenced in Ontario because the Ontario court has no jurisdiction.

¶ 97 To my knowledge no court to date has found that rule 17.02(h) is invalid. The issue of invalidity was not argued in this case.

¶ 98 In my view, rule 17.02(h) confers jurisdiction on an Ontario court. The more important issue is whether Ontario is the more convenient forum.

¶ 99 If the law is that damages sustained in Ontario is not sufficient to confer jurisdiction on an Ontario court and a "real and substantial connection" test is to be imported into rule 17.02(h), then, the rule requires amendment.

¶ 100 Any rule amendment would require some definition of the meaning of "real and substantial connection" so that a plaintiff would be able to tell where the line is crossed to give the Ontario courts jurisdiction.

¶ 101 If the extent of damage sustained in Ontario is not sufficient to confer jurisdiction on Ontario courts, then, a plaintiff should be required to seek leave to serve a claim on a foreign defendant. In order to lessen the cost of litigation there seems little sense in serving a claim on a foreign defendant if Ontario courts do not have jurisdiction.

¶ 102 If damage sustained in Ontario is no longer sufficient to confer jurisdiction and a "real and substantial connection" to Ontario is required, the whole purpose and intent of rule 17.02(h) will be defeated. As Linden J. said in the Vile case:

> We are of the opinion that it was the intention of the Legislature, when it amended Rule 25(1)(h), to enable people of Ontario to use their own courts more easily to sue tort-feasors for damage sustained in Ontario, as a result of torts that were committed elsewhere.

¶ 103 If damage sustained in Ontario is no longer sufficient to confer jurisdiction on Ontario courts, I suggest that many individual Ontario plaintiffs will find it prohibitive to commence and continue litigation in a foreign jurisdiction. I suggest that if that is the case justice will not be served.

¶ 104 I suggest that where the minimum connection to Ontario under the rules is met the emphasis should not be placed on whether an Ontario court or a foreign court has jurisdiction. The paramount consideration should be which court is the more convenient forum. That is the more equitable result and one in which justice will be best served.

¶ 105 I find that Ontario has jurisdiction in this case and that Ontario is the more convenient forum for the case to be heard.

¶ 106 Therefore, the defendants' motion is dismissed with costs payable to the plaintiffs forthwith after assessment.

B. WRIGHT J.

* * * * *

Schedule

¶ 107

In examining the decisions in MacDonald, Leufkens, and Jean-Jacques, there is some overlap in the factors considered for jurisdiction and convenient forum. I have listed the factors considered in each decision for both the real and substantial connection test and the assessment of convenient forum.

MacDonald v. Lasnier (1994), 21 O.R. (3d) 177

"real and substantial connection" (pages 182-183)

- location of accident
- defendant's place of residence
- defendant's place of business

* jurisdiction that regulates the defendant's profession
* standard of care dictated by the province where care given
* location of witnesses
* location of records and documentation
* plaintiff's pain and suffering in Ontario

forum non conveniens (p. 184-185)

* location of witnesses and the relevance of their evidence
* inconvenience of witnesses travelling to other jurisdiction
* language difficulty of Quebec witnesses in Ontario
* no significant difference in the assessment of damages in the two jurisdictions
* juridical advantage (legal aid; expense; time in getting to trial)

Leufkens v. Alba Tours International, [2001] O.J. No. 644

"real and substantial connection" (paragraphs 23, 24, 27, 28, 29)

* location of accident
* defendant's place of residence
* defendant's place of business
* location of provision of services
* location of witnesses
* proper law to be applied
* defendant's reasonable contemplation that injury in Ontario could result from provision of services in another jurisdiction
* plaintiff's place of residence
* plaintiff's pain and suffering and medical expenses in the jurisdiction

forum non conveniens (paragraphs 33 to 40)

* location of plaintiffs and defendants
* location of events in issue and the particulars of the alleged negligence, including the operation of the tour, the emergency medical treatment at the site, the ambulance service, and the medical treatment in the hospital in Costa Rica
* applicable law is the law of Costa Rica
* requirement of expert witness regarding the application of Costa Rican law
* location of one of the defendant's key witnesses on liability
* location of witnesses for the cross-claim
* location of plaintiffs' witnesses
* requirement of expert witnesses on the standard of medical care in Costa Rica
* juridical advantage (multiple defendants will not defend in Ontario so remaining defendant will have trouble obtaining evidence from key witnesses; defendant's insurer will not defend in Ontario; plaintiffs' costs of litigating in Costa Rica)
* multiplicity of proceedings

Jean-Jacques v. Jarjourai, [1996] O.J. No. 5174 (S.C.J.)

"real and substantial connection" (paragraphs 12 and 13)

- * defendant's place of residence
- * defendant's place of business
- * jurisdiction that regulates the defendant's profession
- * standard of care dictated by the province where care given
- * location of witnesses
- * location of records and documentation
- * plaintiff's pain and suffering in the jurisdiction
- * plaintiff's place of residence

forum non conveniens (paragraph 17)

- * location of plaintiff and defendant at the time of the incident
- * location where the defendant practices medicine
- * location of witnesses to the events which establish liability
- * location of records
- * applicable law
- * juridical advantage (limitation period; availability of legal aid; availability of legislation allowing similar claims)

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