

**CROSS BORDER JURISDICTIONAL QUESTIONS -
CANADIAN PERSPECTIVE**

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Prepared by: Michael J. Winward
Mackesy Smye LLP
Barristers & Solicitors
117 Hughson Street South
Hamilton, ON L8N 1G7

Tel: 905-525-2341
Fax: 905-525-6300
winward@mackesysmye.com

MICHAEL J. WINWARD

Michael Winward received his LL.B. from the University of Western Ontario in 1983. He was called to the Bar of Ontario in 1985 and immediately commenced employment with Mackesy Smye LLP, becoming a partner in 1990. Michael restricts his practice to civil litigation with an emphasis on personal injury and insurance litigation. Michael has enjoyed being a trustee of the Hamilton Law Association and has sat on a number of its committees. Michael is also a member of the Advocates' Society, The Association of Trial Lawyers of America and the Ontario Trial Lawyer's Association. Michael has presented papers on various topics to the Ontario Trial Lawyers Association, the Advocates' Society and the Hamilton Law Association.

Imagine that a client comes into your office concerning an injury they suffered as a result of a tort committed outside Ontario. Will an Ontario court assume jurisdiction over your client's claim against an out of province defendant who is alleged to be liable in tort for damages?

This paper will address that issue relative to three categories of cases: motor vehicle accident cases, occupier's liability cases and holiday cases.

RULE 17 OF THE RULES OF CIVIL PROCEDURE

Pursuant to Rule 17.02(h) of the *Rules of Civil Procedure*, a defendant may be served outside Ontario with an originating process where the proceeding is in respect of damages sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed. Therefore, in a case where an Ontario resident is injured outside Ontario but returns to Ontario subsequent to the injury and continues to suffer damages as a result of that injury, there is requisite authority under the *Rules of Civil Procedure* to serve the out of province defendant with a Statement of Claim.

On being served with the Statement of Claim, the out of province defendant will do one of three things:

a) File a Notice of Intent to Defend and/or Statement of Defence. In this circumstance, the defendant will be taken to have attorned to the jurisdiction of the Ontario courts and the case will proceed (*Wood v. Sharp* [2006] O.J. No. 1925).

b) The defendant will not respond to the Statement of Claim in any fashion in which case they may be noted in default. Plaintiff's counsel may then have damages assessed by the court. The plaintiff will be faced with the very real practical difficulty of having the default judgment recognized and enforced in the defendant's jurisdiction.

c) The defendant, either directly or through an insurer, will retain counsel who will bring a motion to set aside service of the Statement of Claim, stay the action and/or dismiss the action. Rule 17.06(1) and (2) provides as follows:

17.06(1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

- (a) for an order setting aside the service and any order that authorized the service;
- or
- (b) for an order staying the proceeding.

(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

- (a) service outside Ontario is not authorized by these rules;
- (b) an order granting leave to serve outside Ontario should be set aside; or
- (c) Ontario is not a convenient forum for the hearing of the proceeding.

This paper will discuss the jurisprudence relative to a defence motion to stay or dismiss an Ontario action relative to service of a claim on an out of province defendant.

JURISDICTION SIMPLICITER/THE REAL AND SUBSTANTIAL CONNECTION TEST

In May, 2002, the Ontario Court of Appeal considered the issue of assumed jurisdiction in five cases where Ontario residents suffered damages as a result of a tort committed elsewhere¹.

In its analysis of whether or not Ontario courts should assume jurisdiction relative to a tort committed in a foreign jurisdiction, the Court of Appeal followed a line of authority established by four seminal cases from the Supreme Court of Canada.²

¹ *Muscutt et al v. Courcelles et al* (2002), 60 O.R. (3d), 20;
Gajraj et al v. DiBernardo et al (2002), 60 O.R. (3d), 68;
Sinclair et al v. Cracker Barrell Old Country Store Inc. (2002), 60 O.R. (3d), 76;
Leufkens et al v. Alba Tours International Inc. et al (2002), 60 O.R. (3d), 84;
Lemmex et al v. Sunflight Holidays Inc. et al (2002), 60 O.R. (3d), 54

² *Morguard Investments Limited v. De Savoye*, [1990] 3 S.C.R., 1077;
Hunt v. T & N Plc [1993] 4 S.C.R., 289;
Tolofson v. Gensen [1994] 3 S.C.R., 1022;
Amchem Products Inc. v. British Columbia (Worker's Compensation Board)

In reviewing the authorities, the Court of Appeal distinguished between the issues of assumed jurisdiction and *forum non conveniens*. The distinction between the two concepts is fairly straight forward: whether an Ontario court can assume jurisdiction relative to a tort committed out of province depends on the real and substantial connection test which is a legal rule. If the court decides that it can assume jurisdiction, the second step in the process is for the court to consider whether it should assume jurisdiction based on the particular facts of the parties in that particular case. In *Muscutt* (supra), the court described the distinction this way:

“While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant”. (Emphasis added)

Therefore, the court will undergo a two-stage approach in considering to proceed with a claim by an Ontario resident against an out of province defendant relative to a tort committed out of province. The first approach considers whether the court can assume jurisdiction under the

real and substantial connection test. If the court assumes jurisdiction, it will then move to the next stage which is a consideration of *forum non conveniens*.

In considering whether to assume jurisdiction under the real and substantial connection test, the Court of Appeal concluded that the test must be flexible. The court declined to reduce the real and substantial connection test to a fixed formula. Rather, the court concluded that a considerable measure of judgment was necessary in assessing whether the real and substantial connection test has been met given the facts of each particular case. While the court noted that “flexibility is therefore important”, the court also noted that “clarity and certainty are also important”. Therefore, the Court of Appeal identified eight factors which emerged from the case law that were relevant in assessing whether a court can assume jurisdiction against an out of province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. The court noted that no one of the eight factors was determinative. Rather, all eight relevant factors should be considered and weighed together. The eight factors are the following:

1. The Connection Between the Forum and the Plaintiff’s Claim

Under this factor, the forum (Ontario) has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tort feors. So long as the plaintiff has a significant connection with Ontario, usually through residence and medical treatment as a result of the injury, the connection between the forum and the plaintiff’s claim will be established.

2. The Connection Between the Forum and the Defendant

Under this factor, the court will consider whether the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff. Specifically, the court will look to see whether there is any connection, directly or indirectly, as between the defendant and Ontario.

3. Unfairness to the Defendant in Assuming Jurisdiction

The principles of order and fairness require an inquiry as to whether the assumption of jurisdiction in Ontario would result in any “significant unfairness” to the defendants. In this regard, as will be discussed more fully ahead, an important consideration for the court is whether the out of province defendant is covered by a policy of insurance that will respond to a claim made in Ontario. In that case, the burden of defending the action will fall on the defendant’s insurer and not on the defendant personally.

4. Unfairness to the Plaintiff in Not Assuming Jurisdiction

The principles of order and fairness also demand a consideration of whether it would be “significantly” unfair to the plaintiff in having to litigate their claim in an out of province jurisdiction as opposed to his or her home jurisdiction. The court is required to consider fairness to the plaintiff and to balance this against fairness to the defendant.

5. Involvement of Other Parties to the Suit

The involvement of other parties is relevant to the real and substantial connection test. The court wants to avoid a multiplicity of proceedings and avoid the risk of inconsistent results from different forums. If the core of the actions involves Ontario defendants, the case for assuming jurisdiction against an out of province defendant is strengthened. By contrast, where the core of the action involves a foreign defendant, courts should be more wary of assuming jurisdiction simply because there exists a claim against an Ontario defendant.

6. Would an Ontario Court be Willing to Recognize and Enforce an Extra-Provincial Judgment Rendered Against an Ontario Resident on the Same Jurisdictional Basis?

In considering whether to assume jurisdiction against an out of province defendant, the Ontario court must consider whether it would recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis. As the court noted:

“Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them.”

Therefore, if an Ontario court would not be willing to recognize and enforce an out of province judgment rendered on the same jurisdictional basis against an Ontario resident, the court cannot assume jurisdiction because the real and substantial connection test has not been met.

7. Whether the Case is Inter-Provincial or International in Nature

The fact that a court case is inter-provincial in nature as opposed to international in nature will weigh in favour of the court assuming jurisdiction in Ontario.

8. Comity and the Standards of Jurisdiction, Recognition and Enforcement Prevailing Elsewhere

In considering whether to assume jurisdiction, the Ontario court should consider the standards of jurisdiction, recognition and enforcement that prevails in the out of province jurisdiction. In inter-provincial cases, this consideration is really unnecessary. However, in international cases the court should consider international standards and rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location in which the defendant is situated. In this regard, the court can consider agreements to which Canada is a party. Additionally, the court should consider the rules governing assumed jurisdiction in the foreign country. Generally speaking, suffering damages in Ontario as a result of a tort committed elsewhere is not accepted as a valid basis for an Ontario court to assume jurisdiction.

FORUM NON CONVENIENS

If an Ontario court can assume jurisdiction over the action, the second step is the consideration of whether there is another forum that is more appropriate to entertain the action. Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action including:

- the location of the majority of the parties,

- the location of key witnesses and evidence,
- contractual provisions that specify applicable law or a core jurisdiction,
- avoidance of multiplicity of proceedings,
- the applicable law and its weight in comparison to the factual questions to be decided,
- geographical factors suggesting the natural forum,
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court (*Muscutt*, supra).

The factors in determining whether an Ontario court will assume jurisdiction somewhat overlaps with the factors the court will consider in determining *forum non conveniens*.

Generally speaking, if an Ontario court will assume jurisdiction relative to a tort committed out of the province, it will also determine that Ontario is the most appropriate forum for the action. That is to say, the *forum non conveniens* test generally follows the assumption of jurisdiction.

THE MOTOR VEHICLE ACCIDENT CASES

Two of the five cases decided by the Ontario Court of Appeal in May, 2002 related to Ontario residents who were injured in motor vehicle accidents outside the province. In *Muscutt*, the plaintiff was injured in a motor vehicle accident which occurred in Alberta. All defendants resided in Alberta. In reviewing the eight factors to assuming jurisdiction over the plaintiff's claim, the court concluded as follows:

1. The plaintiff required extensive medical attention in Ontario and his claim was for pain and suffering occasioned in Ontario. Therefore, there was a significant connection between the plaintiff and the province of Ontario.
2. The defendants had no connection to Ontario what would justify the assumption of jurisdiction. This weighed against assumption of jurisdiction in Ontario.
3. There was evidence that the defendants were insured by an automobile insurance policy, the terms of which provided coverage for suits in other Canadian provinces. The burden of defending the suit would fall on the defendant's insurer and not on the defendants personally. Therefore, there was no unfairness to the defendant if an Ontario court assumed jurisdiction.
4. If the court refused to assume jurisdiction in Ontario, the plaintiff would be compelled to

litigate in Alberta. Given the injuries the plaintiff sustained, this would be inconvenient, particularly since the plaintiff did not have the benefit of an insurer to cover the cost of the litigation. This unfairness weighed in favour of the Ontario court assuming jurisdiction.

5. There was no involvement of other parties to the litigation. Therefore, involvement of other parties was not a significant factor.
6. An Ontario court would recognize and enforce a judgment from another province rendered on the same jurisdictional basis. That is to say, if the facts were reversed and an Alberta resident was injured in Ontario as a result of the tortious conduct of an Ontario resident, an Ontario court would recognize and enforce an Alberta judgment as against the Ontario resident. This weighed in favour of the Ontario court assuming jurisdiction.
7. The fact that this was an interprovincial case as opposed to an international case weighed in favour of the Ontario court assuming jurisdiction.
8. Because this was an interprovincial case, it was not necessary for the court to consider the standards of jurisdiction, recognition and enforcement that prevailed within a sister province.

In weighing all eight factors, in *Muscutt*, the Court of Appeal concluded that the Ontario court should assume jurisdiction. The court then considered the next question which was

whether Ontario was the *forum conveniens*. The court noted that the inconvenience that would result to the plaintiff if he were required to bring the action in Alberta outweighed the defendant's inconvenience in defending the action in Ontario. For the plaintiff to bring his action in Alberta would require significant effort and expense considering that all medical witnesses were from Ontario. It was therefore concluded that Ontario was the most convenient forum for the action.

In addition to *Muscutt*, the Court of Appeal considered another out of province motor vehicle accident but came to the opposite conclusion relative to assuming jurisdiction. In *Gajraj et al v. DiBernardo et al*, the court considered an action where the plaintiffs, residents of Brampton, were injured in a motor vehicle accident which occurred in New York City. In this case, the court refused to assume jurisdiction in Ontario. The distinction between this case and *Muscutt* was as follows:

- There was no evidence of the nature or existence of an insurance policy that would respond to the claim on behalf of the defendant. Therefore, the court held that there was an element of unfairness to the defendants if the court in Ontario assumed jurisdiction.
- The court found that there was no "significant degree of unfairness" to the plaintiff if it did not assume jurisdiction in Ontario. The court noted that where a party travels to another country and is involved in a motor vehicle accident there, it is reasonable to expect that a dispute with a local driver would be litigated in the foreign jurisdiction.

- Out of an abundance of precaution, the plaintiff named his own insurer under the OPCF 44R Family Protection Coverage Endorsement as a defendant to the proceeding. Under the said endorsement, liability and damages are to be determined either by agreement between the parties or by a court of competent jurisdiction in Ontario. The plaintiffs had submitted that since the action against its insurer must proceed in Ontario, jurisdiction should be assumed against the New York defendants to avoid a multiplicity of proceedings. However, the Court of Appeal did not accept this argument. The court noted that on the evidence before it, the claim against the plaintiffs' insurer was "entirely speculative in nature". The court noted that the core of the claim was against a New York defendant, not the plaintiffs' insurer, an Ontario defendant. Therefore, the court was not prepared to consider the involvement of the plaintiffs' insurer as a factor in assuming jurisdiction against the New York residents.
- The court was also concerned that assuming jurisdiction in Ontario would create a rule requiring Ontario courts to recognize and enforce judgment of foreign courts for damages arising from Ontario motor vehicle accidents. As the court stated: "In my view, Ontario courts should hesitate to adopt a jurisdictional rule requiring Ontario motorists to defend themselves in foreign courts against suits for damages arising from accidents in Ontario or face enforcement of a default judgment against them". This factor weighed against the court assuming jurisdiction.
- This was an international case as opposed to an interprovincial case and weighed against

assuming jurisdiction.

The court noted that the United States has adopted a “minimum contacts” doctrine under which the assumption of jurisdiction in the United States requires an act or conduct by the defendant that amounts to personal subjection to the American jurisdiction. The court noted:

“It is virtually certain that New York courts would not recognize or enforce an Ontario judgment against a New York defendant for damages sustained in Ontario as a result of a motor vehicle accident in New York unless the defendant voluntarily attorned to the jurisdiction.”

Since the New York defendants had not voluntarily attorned to the jurisdiction, and because American law required a minimum contacts doctrine, it was a factor against the court’s assuming jurisdiction in Ontario.

Taking all of the above considerations into account, the Court of Appeal refused to assume jurisdiction of this New York motor vehicle accident.

Since *Gajraj* was decided, there have been a number of cases involving motor vehicle accidents in the United States in which the courts have assumed jurisdiction by distinguishing *Gajraj* on its facts. The most noteworthy of these cases is *Doiron v. Bugge et al* [2005], O.J. No. 4285. In that case, the plaintiff was a childcare worker residing in St. Thomas, Ontario. She accepted an invitation from the New York YMCA to volunteer to assist with relief work following the September 11th, 2001 terrorist attacks in New York. The plaintiff was injured in New York while

a passenger in the defendant's vehicle. The plaintiff suffered serious personal injuries. In reviewing the eight factors to consider the assumption of jurisdiction, the Court of Appeal distinguished *Gajraj* and assumed jurisdiction based on the following:

- The plaintiff and the defendant had a relationship of sorts that existed prior to and independent of the accident. The fact that the plaintiff accepted the invitation of the New York YMCA to attend in New York and the defendant assumed the responsibility of transporting the plaintiff while she was in New York, established a connection between the defendant and Ontario.
- Unlike *Gajraj*, there was evidence before the court that the defendant did have a policy of automobile insurance that would respond to the plaintiff's claim in Ontario. The existence of this policy of insurance mitigated any element of unfairness to the defendant in being forced to defend the action in Ontario.
- Based on the evidence before it, the Court of Appeal held that the plaintiff would face considerable unfairness if she was required to litigate her claim in New York. The nature of the plaintiff's injuries made it very difficult for her to travel to New York. Additionally, there was evidence before the court that the plaintiff had no assets to travel to New York nor did she have the means to cover the expense of having her treating physicians go to New York to testify. Such evidence was lacking in *Gajraj*.

- The defendant's policy of automobile insurance had policy limits of \$100,000.00 U.S. Due to the nature of her injuries, the plaintiff included a claim against her own insurer pursuant to the OPCF 44R Family Protection Endorsement. Pursuant to the terms of that endorsement, her claim must be brought in Ontario. Unlike *Gajraj* where the claim against the plaintiff's insurer was, on the evidence, "entirely speculative", in *Doiron* the plaintiff lead evidence that she suffered significant injuries rendering her unfit to return to work. Therefore, the joinder of the plaintiff's insurer into the claim was not speculative in nature and favoured the assumption of jurisdiction by the Ontario courts.
- Because the case involved a motor vehicle accident in a neighbouring jurisdiction with an insured party who had a pre-existing relationship with the plaintiff with a genuine claim against her Ontario insurer, it was more likely that Ontario courts would be prepared to recognize a foreign judgment as against an Ontario defendant on the same jurisdictional basis.
- The "minimum contacts" doctrine in American law took on less importance where there was evidence that the defendant was insured by a policy of insurance that was obliged to respond to the plaintiff's claim.

Trial level courts have also distinguished *Gajraj* on a number of different bases. The following is a summary of some of those cases:

Subramaniam v. Shelter et al (2002), 61 O.R. (3d), 136; leave to appeal denied [2002] O.J. No. 5071.

In that case, the plaintiff, an Ontario resident, was a passenger in a vehicle leased to a defendant Ontario corporation and operated by a defendant Ontario resident. The vehicle collided with another vehicle owned by a defendant who was from Washington State operated by a defendant from New Jersey. The accident occurred in the State of Nebraska. Therefore, the place of the accident (Nebraska) had no connection to any party. The plaintiff commenced an action in Ontario and the out of province defendants moved for an order staying the action against them on the grounds that Ontario had no real and substantial connection with the subject matter of the action. The application came before Mr. Justice Lane. There was evidence that the moving defendants were both insured but their policy limits were only \$25,000.00. There was no suggestion that the defendants' insurer would not respond to the action in Ontario. Because the out of province defendants' insurance limits were low, the plaintiff included a claim against his own insurer pursuant to the OPCF 44R Family Protection Endorsement. The court distinguished *Gajraj* on the basis that neither of the moving parties had any connection to the place of the accident, there were necessary defendants who were Ontario residents (the owner and operator of the vehicle in which the plaintiff was a passenger and the plaintiff's own insurer), the existence of a policy of insurance that would respond to the plaintiff's claim relative to the out of province defendants and the very real possibility that the plaintiff would have to access his own underinsurance policy. The court decided to assume jurisdiction over the action. The court

went on to consider the second consideration, being *forum non conveniens*, and held that there was no other more appropriate forum for the trial of the action.

· *Verbora v. Allstate Insurance Company of Canada* [2003], O.J. No. 5298

In this case, an Ontario resident was injured in a motor vehicle accident in South Carolina where the negligent motorist was from New York State. Mr. Justice Granger distinguished *Gajraj* on the basis that the defendants were not resident in the place where the accident occurred. Justice Granger concluded that the real and substantial connection test weighed in favour of Ontario over South Carolina.

Counsel for the defendant has advised that leave to appeal Justice Granger's decision was granted in 2004 but subsequently the action settled and the appeal was never heard.

· *Wood v. Sharp* [2006], O.J. No. 1925

In this case, the plaintiff, an Ontario resident, was injured in a motor vehicle accident while vacationing in Michigan. The defendant was a Michigan resident. However, before challenging the court's jurisdiction to hear the action, the defendant filed a Notice of Intent to Defend, a Statement of Defence, conducted Examinations for Discovery in Ontario and consented to a trial date being set. In those circumstances, the court held that the defendant had attorned to the jurisdiction and therefore could not later challenge the court's assumption of that jurisdiction. However, in *obiter*, the court went on to consider whether, even if the

defendant had not attorned to the jurisdiction, jurisdiction should be assumed based on the eight *Muscutt* factors. In weighing the factors, Mr. Justice Bryant noted that there was evidence that the defendant was insured by a policy of automobile insurance with limits of \$50,000.00. Justice Bryant also noted that defence counsel had been unable to even locate his client and therefore it could not be said that there was any unfairness to the defendant in proceeding with the claim in Ontario since the defendant could not be found. Largely because it would be so unfair to the plaintiff, at that late stage in the litigation, to decline jurisdiction, Justice Bryant found that the real and substantial connection test had been met and Ontario was the most convenient forum for the action.

Greco v. Fleming [2003], O.J. No. 2324

In this local Hamilton case, Justice Whitten considered an action where the plaintiff, a Hamilton resident, was injured in a motor vehicle accident in Buffalo, only one hour from her home. There was evidence that the defendant was insured by a policy of automobile insurance with limits of \$100,000.00 U.S. In considering the eight *Muscutt* factors, Justice Whitten particularly stressed the final three, declined to assume jurisdiction and dismissed the plaintiff's claim. The final three factors that were weighty to Justice Whitten's decision were the facts that Ontario courts should not be prepared to recognize and enforce extra provincial judgments against Ontario residents rendered on the same jurisdictional basis, the case was international in nature as opposed to interprovincial and American law followed the "minimum contact" doctrine. Effectively, Justice Whitten analyzed this action very similar to the way in which the Court of Appeal analyzed the facts in *Gajraj* and declined to assume

jurisdiction over the action.

OCCUPIER'S LIABILITY CASES

One of the five cases heard by the Ontario Court of Appeal in 2002 related to a slip and fall accident. In *Sinclair et al v. Cracker Barrell Old Country Store Inc.*, supra, the plaintiff, an Ontario resident, slipped and fell in a washroom of a restaurant in Blasdell, New York. The restaurant was owned and operated by a Tennessee corporation which carried on business in various States in the United States. The plaintiff brought her action in Ontario. The defendant made an application to the court to set aside service of the Statement of Claim and to dismiss the action or stay the proceeding pursuant to Rule 17. Master Clark dismissed the motion but Matlow J. allowed the appeal and stayed the action. The plaintiffs appealed to the Court of Appeal. The plaintiffs' appeal was dismissed and the action was stayed. The Court of Appeal weighed the eight factors in determining whether there was a real and substantial connection between Ontario and the cause of action as follows:

1. Since the plaintiff was a permanent resident of Ontario and suffered damages for pain and suffering in Ontario, there was a connection between the forum and the plaintiff's claim.
2. There was no connection between the forum and the defendant, a Tennessee corporation. The corporation did not carry on business in Ontario. Although the restaurant did carry on business near the Canadian border and it may have been foreseeable that customers from

Ontario would be injured on its premises, that was not sufficient to connect the forum to the defendant.

3. The court found that the assumption of jurisdiction would be unfair to the defendant. The court found that a restaurant owner and operator should not be expected to litigate claims at the place of residence of all its customers. This unfairness could have been mitigated if there was evidence that the defendant had insurance to cover an Ontario judgment, but there was no such evidence to that effect in this case.
4. If jurisdiction was not assumed, the plaintiff would be compelled to litigate the claim in New York. Although this would be inconvenient to the plaintiff, it was not unfair to any “significant degree”.
5. There were no other named defendants in the action and therefore there was no need to consider the involvement of other parties to the law suit.
6. It was the view of the court that Ontario courts would not be prepared to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis as in this case.

As the court stated:

“Travellers from all corners of the earth might choose to dine in any Ontario restaurant. Absent special circumstances, to require Ontario restaurant owners and operators to defend their conduct in the home

jurisdictions of their customers would impose an undue and unreasonable burden on them.”

7. This was an international case rather than interprovincial case and assumed jurisdiction was therefore more difficult to justify.

8. Because this was a case out of the United States, the American minimum contacts doctrine had to be considered. Under that doctrine, there must be an act or conduct by the defendant amounting to personal subjection to the jurisdiction. If an Ontario judgment would not be enforceable in New York, it was little or no advantage in allowing the Ontario plaintiffs to litigate their claims here.

Sinclair has been considered in at least two subsequent occupier liability actions. In *Georges v. Basilique de Ste.-Anne-de-Beaupre* [2004], O.J. No. 3762, the plaintiff, a 74 year old woman from Leemington, slipped and fell backwards while a tourist visiting the Ste.-Anne-de-Beaupre Basilica. As a result of this accident, the elderly plaintiff suffered very significant injuries including a fractured skull, wrist injuries, respiratory problems, difficulty ambulating and chronic headache. She brought her action in Ontario. The defence brought a motion for an order setting aside the service *ex-juris* and an order dismissing or staying the plaintiff’s action. Justice Thomson of the Superior Court of Justice reviewed the eight factors relevant to the real and substantial connection test and concluded that Ontario should assume jurisdiction over the action. Justice Thomson found

that although there was no connection between Ontario and the defendant, assuming jurisdiction in Ontario would not result in any significant unfairness to the defendants. The court noted that the Basilica was an “allure...to religious pilgrims throughout North America and indeed the world” and therefore the defendants were “engaged in an activity that involves an inherent risk of harm to extra provincial parties”. Justice Thomson also found that due to the plaintiff’s age, distance from Quebec and extent of her injuries, not assuming jurisdiction would amount to a significant unfairness to her. Lastly, because this was an interprovincial rather than international case, it was less difficult for the court to assume jurisdiction.

In *Marabella v. Pietracupa* [2006], O.J. No. 403, Justice Perell of the Superior Court considered the case of an Ontario resident who was visiting her brother in the Province of Quebec when she slipped and fell on the driveway outside his basement apartment. The plaintiff commenced an action in Ontario as against the owners of the home from whom her brother was renting. In Reasons that are, with respect, somewhat light on analysis, Justice Perell assumed jurisdiction over the action noting that he was “told” that the defendants were insured and the burden of defending the claim would therefore fall on their insurer and not on the defendants personally. Additionally, the interprovincial nature of the case made it “easier” for the Ontario court to assume jurisdiction.

HOLIDAY CASES

Two of the five cases decided by the Ontario Court of Appeal in 2002 related to Ontario residents bringing a claim for injuries suffered while on holiday. In *Leufkens et al v. Alba Tours International Inc. et al*, supra, the plaintiff was on holiday in Costa Rica and was injured during an excursion tour when he fell while using a harness and guide wires to move between platforms in a canopy of trees. The plaintiff sued the Canadian tour companies from which they purchased the vacation package, the Swiss Travel Service, the Costa Rican company that sold the excursion tour and the owner and operator of the tour as well as the Red Cross of Costa Rica and the Costa Rican medical professionals who treated him. The moving party was the Swiss Travel Service which moved to stay the action against it. Justice Swinton granted the motion for the stay and the plaintiffs appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and upheld the stay of the action. The court reviewed the eight factors in deciding whether the real and substantial connection test had been met as follows:

1. The plaintiff was a resident in Ontario and required extensive medical attention in Ontario. Therefore, there was a connection between the plaintiff's claim and the forum.
2. Swiss Travel Service had no direct contact with Ontario. It does not carry on business in Ontario nor does it have property or assets in Ontario. There was no evidence of any act or conduct by Swiss Travel Service within the territory of Ontario. Therefore, there was no significant connection between the defendant and the forum.
3. There would be an element of unfairness to Swiss Travel Service if the Ontario court were

to assume jurisdiction. Although the Swiss Travel Service offers a service that is aimed specifically to tourists, it did not mean that they could reasonably expect to litigate in any jurisdiction in which all of its clients reside. It was worthy of note, that there was no evidence before the court that Swiss Travel Service was covered by a policy of insurance that would respond to a claim in Ontario.

4. The court found that there would be no significant unfairness to the plaintiff in not assuming jurisdiction because “The plaintiff could have no reasonable expectation that he would be able to sue the Costa Rican company in the courts of Ontario if he was injured in Costa Rica”.
5. There were other parties involved in the law suit that were Ontario based defendants and those parties were clearly subject to the jurisdiction of the Ontario courts. However, the court noted that the core of this action was in Costa Rica and concerned Costa Rican defendants and the involvement of the Ontario based parties must be assessed from that perspective. In this case, the action centred on the alleged negligence of the foreign defendants and the Ontario defendants were “secondary”.
6. For the Ontario court to assume jurisdiction in this case would effectively require Ontario courts to enforce foreign judgments rendered on the same jurisdictional basis against Ontario defendants who offer tourism services to visitors in Ontario. The court stated:

“In my view, we should not adopt such a rule, since it would impose an unreasonable burden on providers of tourism services in Ontario.

To take the example mentioned during oral argument, it would seem harsh to require an Algonquin Park Canoe Rental operator to litigate the claim of an injured Japanese tourist in Tokyo. Although negligent operators should certainly be held to account for their negligence, if they confine their activities to Ontario, they are entitled to expect that claims will be litigated in the courts of this province.”

7. The case was international rather than interprovincial which rendered the assumption of jurisdiction more difficult to justify.

8. The assumption of jurisdiction in this particular case would not accord with the standards of jurisdiction, recognition and enforcement prevailing elsewhere. Sustaining consequential damages within the jurisdiction as a result of a wrong committed elsewhere is not generally accepted as a valid basis for assumed jurisdiction.

The second holiday case considered by the Court of Appeal was *Lemmex et al v. Sunflight Holidays Inc. et al*, supra. In that case, the plaintiffs, residents of Ottawa, purchased a vacation package from the defendant Sunflight Holidays Inc., a Canadian corporation. The package was for a Caribbean cruise operated by the defendant Premier Cruises Limited, a Florida corporation. As part of the cruise, the defendant Premier selected George Huggins and Company as a provider of excursions to the island of Grenada. The plaintiffs purchased tickets from Premier Cruises for a tour on the island. The plaintiffs were then taken on a tour in a minivan driven by the defendant, a

resident of Grenada. During the drive, the plaintiff collapsed as a result of carbon monoxide poisoning and suffered personal injuries. The plaintiffs brought their action in Ontario. The defendants, Huggins and Company, the excursion company, and the defendant, Bernard, the operator of the vehicle, brought a motion pursuant to Rule 17.06 for an order setting aside the service *ex juris* or staying the action against them. Their motions were dismissed. They appealed with leave to the Divisional Court. The Divisional Court, with Justice O’Leary dissenting, dismissed the appeal. They appealed to the Court of Appeal. The Court of Appeal allowed their appeal and stayed the action. The analysis in this appeal was very similar to that in *Leufkins*, supra. Again, the court noted that there was no evidence as to whether the moving defendants had insurance coverage or what the nature and extent of any coverage might be. The court noted that if there had been evidence of insurance coverage which fully indemnified the moving defendants against an Ontario judgment, it would be a “relevant factor to consider”. Once again, the court specifically expressed a reluctance for any Ontario court to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis. The court stated:

“Recognition and enforcement of foreign judgments in such circumstances would impose an unreasonable burden on providers of tourism services in Ontario. Providers of tourism services who confine their activities to Ontario are entitled to expect that actions against them will be litigated in Ontario courts. They should not be compelled to defend such actions in foreign courts or face enforcement of a default judgment against them. Accordingly, this factor weighs against assuming jurisdiction in this case.”

The *Leufkins* and *Lemmex* cases have been distinguished. In *Sidlofsky v. Crown Eagle Limited* [2002], O.J. No. 4152, Justice Backhouse of the Superior Court considered an action

in which the plaintiffs purchased a vacation package in Ontario from Sunquest, an Ontario corporation, which included travel, accommodation and food. The accommodation was provided by Holiday Inn in Jamaica. Holiday Inn is a Tennessee corporation. While walking in the hotel in Jamaica, the plaintiff fell and was very severely injured. The plaintiff sued the tour operator and Holiday Inn in Ontario. There was evidence before the court that Holiday Inn was insured and was obligated to indemnify Sunquest. Holiday Inn brought an application to the court to set aside the service *ex juris* and stay the action. Of particular note was the fact that there was evidence before the court that the Holiday Inn had a \$10,000,000.00 policy of liability insurance.

Justice Backhouse distinguished *Leufkins* and *Lemmex* on a number of bases including the fact that the injury did not occur during an activity but rather occurred as a result of a dangerous condition of the premises. Further, the vacation package was purchased in Ontario and the Holiday Inn, although a Tennessee corporation, was the agency by which the Ontario tour company fulfilled its accommodation and food obligations to the plaintiff. Additionally, there was an indemnity agreement between the out of province defendant, The Holiday Inn, and the local defendant, Sunquest. Lastly, the hotel was advertised in Ontario. Therefore, there was, of sorts, a connection between the defendant and the forum.

Justice Backhouse also took particular notice of the fact that if the Ontario court did not assume jurisdiction, the plaintiff would have to mount his case in Jamaica. To require his medical witnesses in Ontario to travel to Jamaica and require all other Ontario witnesses to travel to Jamaica

would amount to a substantial unfairness to the plaintiff. On the other hand, the defendant Holiday Inn was insured by a policy of insurance which would respond to any expenses in litigating the claim in Ontario.

In *Eid et al v. Hola Sun Holidays et al*, court file 05-CV-287627PD1 (unreported) the plaintiff, an Ontario resident, was injured while on vacation in Cuba. The resort owner, a Spanish corporation, brought a motion to stay or dismiss the claim against it. Justice Conway dismissed the motion noting in particular that the moving corporation “Actively advertises and promotes in Ontario for residents to come to its hotels in Cuba”. This promotion provided a connection with Ontario and made it reasonably foreseeable that Ontario residents could sustain damages for activities occurring in Cuba.

The notion that advertising in Ontario helps connect the defendant to the forum is an interesting one in the day and age of website advertising. It would seem reasonable to argue that if a foreign defendant maintains a website searchable on a computer in Ontario, that defendant is advertising in Ontario. As such, it helps connect the defendant to the forum and also helps in rebutting the foreign defendant’s argument that it would be unfair to that defendant if the Ontario court assumed jurisdiction. Simply put, if the foreign defendant wants to advertise in Ontario to lure Ontario residents to its business, it is not substantially unfair for that defendant to have to defend itself in any negligence claim in an Ontario court.

CONCLUSIONS AND PRACTICAL CONSIDERATIONS

If consulted by a client who has been injured as a result of a tort committed by an extra provincial resident or corporation, counsel will be required to be creative and diligent in garnering the evidence to meet the eight factors relative to the real and substantial connection test. This task is clearly made more simple if the case is interprovincial. If the case is international in nature, counsel should consider the following course of action:

- a) Issue and serve the Statement of Claim well prior to the limitation period. Once a dialogue has been established either between a defence counsel or an agent for the foreign defendant, demand production under Rule 30.2(3) of any and all insurance policies under which an insurer may be liable to satisfy all or part of the judgment in the action or to indemnify or reimburse any party to the action. If production is not forthcoming, bring a motion for production. The existence and terms of a foreign defendant's policy of insurance can go a long way in persuading a court to assume jurisdiction over the claim in a number of ways including:

- In balancing the unfairness to the defendant in assuming jurisdiction with the unfairness to the plaintiff in not assuming jurisdiction, the existence of a policy of insurance will mitigate any element of unfairness to the defendant because the costs of the action will be borne by the insurer. In contrast, should the court not assume jurisdiction, the plaintiff would be

personally responsible for the costs of bringing witnesses to testify in the foreign jurisdiction.

· In the case of a motor vehicle accident, it is critical to determine whether there will be sufficient insurance to respond to the extent of the plaintiff's damages. If the medical evidence reasonably establishes that the plaintiff's claim will exceed the third party limits available to the defendant, the plaintiff will have to include the OPCF 44R Family Protection Endorsement insurer as a party to the action. Pursuant to the terms of that endorsement, that component of the claim must be tried in Ontario. This would be a factor in the court assuming jurisdiction in Ontario.

· An Ontario court would be far more willing to recognize and enforce an extra provincial judgment against an Ontario resident where that Ontario resident was insured by a policy of insurance that was contractually obliged to respond to the claim in the foreign jurisdiction. Simply put, an Ontario court would be more willing to recognize and enforce an extra provincial judgment as against an Ontario resident who was insured as opposed to a resident who was not insured.

· The rules governing assumed jurisdiction, recognition and enforcement of judgments in the foreign jurisdiction take on a lesser importance if the foreign defendant is insured by a policy of insurance that is obliged to respond to the claim in Ontario. That is to say, if the foreign defendant was represented in the Ontario action through its insurer, and if the Ontario

resident obtained a judgment, the insurer would be obliged to respond. In those circumstances, the standards of jurisdiction, recognition and enforcement prevailing in the foreign jurisdiction are of secondary importance since the defendant's insurance contract was obliged to recognize the judgment in any event.

- b) Consider consulting with and possibly retaining counsel in the foreign jurisdiction relative to the limitation periods that apply to the cause of action in that jurisdiction and whether there are any barriers in your client to commencing an action in that jurisdiction. It may very well be prudent to arrange for the counsel in the foreign jurisdiction to issue process so as to protect the limitation period within that jurisdiction should the Ontario action be either stayed or dismissed. Additionally, counsel in the foreign jurisdiction should be able to assist relative to the eighth factor in the real and substantial connection test, being the standards of jurisdiction, recognition and enforcement that are prevailing in that jurisdiction.
- c) Move quickly in obtaining all relevant damage documentation by way of medical records, reports, loss of income information, rehabilitation information, etc. If the client's injuries are serious enough to make travel to the foreign jurisdiction difficult, it will assist in persuading the court that it would be unfair to the plaintiff to have to travel to the outside jurisdiction to try the action. Additionally, in the context of a motor vehicle accident claim with limited third party limits available to the foreign defendant, it will assist in showing the court that the claim as against the OPCF 44R insurer is real and not speculative.

- d) In the context of an injury occurring while on holiday or an occupier's liability type claim, check to see whether the foreign defendant advertises in Ontario, whether on the website or otherwise. If the foreign defendant does advertise in Ontario, it assists in connecting that defendant to the province and also assists in establishing that the defendant should have a reasonable expectation that it could be subject to a law suit in Ontario if it lures Ontario residents to its jurisdiction.

It is worthy of note that of the five cases that were heard by the Court of Appeal in 2002, only one action was allowed to proceed (*Muscutt*). That case involved an Ontario resident injured in a motor vehicle accident in Alberta. Every other case involved an Ontario resident injured while outside Canada. In each of those cases, the action against the foreign defendants was stayed. If counsel is going to issue process in Ontario relative to a tort outside Canada, counsel is going to have to be creative and imaginative in distinguishing the cases that have been decided by the Court of Appeal.

