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PUBLICATION

Ontario Court of Appeal confirms that a multiplicity of lawsuits arising out of same automobile accident is sometimes necessary

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Lawyers You Should Know: Jason Mangano

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Jason P. Mangano was counsel for the Respondent underinsured motor vehicle carrier at first instance and the appeal.

Facts

The Court of Appeal recently released its highly anticipated decision in ***Forsythe v. Westfall***. Forsythe, an Ontario resident, was injured in a single vehicle accident in British Columbia while riding on a motorcycle owned and operated by Westfall, an Alberta resident. She was treated for her injuries first in British Columbia and Alberta and subsequently in Ontario.

Westfall alleged the accident may have been caused by an unidentified driver. Forsythe pursued damages for her injuries against Westfall (in tort), an Alberta based uninsured/unidentified motorist carrier (Westfall's insurer), and her own underinsured motorist carrier insurer (44R) in Ontario. Westfall was also sued in tort in British Columbia in an effort to prevent her claim from becoming statute-barred.

Like all 44R policies issued in Ontario, Forsythe's policy required she litigate her claim for underinsured coverage against her insurer in Ontario.

Westfall brought a motion in the Ontario action on the basis that Ontario lacked jurisdiction *simpliciter* in respect of the tort allegations made against him.

The Lower Court Decision

The Court followed its approach in ***Tamminga*** and reasoned that having an insurance claim associated with a tort claim with which Ontario had no jurisdiction *simpliciter* does not establish a real and substantial connection between the matter, the parties, and the province. It also held that the forum of necessity doctrine did not apply because Forsythe was able to sue in Ontario to enforce her claim against her own 44R. The Court recognized that this potentially denied her of a convenient "one-stop access to justice."

The Appeal

Forsythe's appeal was heard by a five-judge panel. The appellant first argued that the policy constituted a "contract connected with the dispute" and was thus satisfactory as a presumptive connecting factor to establish jurisdiction *simpliciter* pursuant to the Supreme Court of Canada's decision in ***Van Breda***.

The Court rejected this argument and instead found that Forsythe's action against Westfall was based in tort only and that her own insurance policy had no nexus to Westfall. The Court further rejected Forsythe's interpretation of ***Tamminga*** and explained that it stood for the proposition that a contract between a plaintiff and her insurer is not a presumptive connecting factor that would give an Ontario Court jurisdiction over a claim against an extra-provincial defendant. Indeed, to decide otherwise would expand the Court's jurisdiction beyond the boundaries established in ***Van Breda***.

The Court then disagreed with the intervener and appellant that it should recognize a new presumptive connecting factor. While the appellant's own insurance contract, the applicable regulatory requirements, her residence, that she sustained damages in Ontario and the requirement that she bring suits in multiple jurisdictions might be appropriate in an argument for *forum non conveniens*, they were not appropriate in assessing jurisdiction *simpliciter*.

Finally, the Court rejected the appellant's submission that Ontario should assume jurisdiction pursuant to the forum of necessity doctrine. Building on the lower Court's reasoning, the Court of Appeal confirmed that the appellant failed to establish that she could not reasonably seek relief elsewhere. The doctrine is applied in only extraordinary and exceptional cases and Forsythe was still able to seek redress in British Columbia.

Significance

The Court of Appeal has removed any doubt that, while uninsured motorist coverage for Ontario residents will be litigated in Ontario, the tort itself will be litigated where the accident occurred in accordance with the private international law principles applied in Ontario. This decision demonstrates that Ontario's jurisdiction to address insurance coverage issues does not impact the*jurisdiction simpliciter* analysis of the underlying tort. Leave to appeal at the Supreme Court of Canada has been sought.