CITATION: Orum v. Maksuta, 2021 ONSC 2974
COURT FILE NO.: CV-18-26622
DATE: 20210421

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Gerald Orum	)	
Plaintiff	)	Brian A. Pickard, Counsel for the Plaintiff
– and –	)	
Sheila Ruby Maksuta and Kent & Essex Mutual Insurance Company	)	
Defendants	)	L. Russell Hatch, Counsel for the Defendant Sheila Ruby Maksuta
	)	No one appearing for the Defendant, Kent & Essex Mutual Insurance Company
	)	**HEARD:** January 25, 2021

RULING ON MOTION

HEBNER J.

[1] This motion was brought by the defendant, Sheila Ruby Maksuta, to dismiss or stay the action against her on the grounds of want of jurisdiction or, alternatively, on the grounds that Ontario is not the convenient forum.

Background Facts

[2] The plaintiff was born on October 3, 1942 and is currently 78 years of age. On August 26, 2016, the plaintiff was in Michigan attending a charitable International Dragon Boat Race. The plaintiff was the event emcee. While in Michigan, the plaintiff crossed North Park Boulevard at the intersection of West Flint Street in Lake Orion. He was walking in a crosswalk, on a green light. While the plaintiff was within the crosswalk, the defendant, Sheila Maksuta, struck him. The plaintiff alleges that he sustained a traumatic brain injury as a result.

[3] The plaintiff commenced this action by way of statement of claim issued on July 12, 2018. He commenced the action approximately six weeks within the two-year limitation period

in Ontario. He did not commence an action in Michigan. The limitation period in the state of Michigan is three years; thus, that limitation period expired in August of 2019.

[4] The plaintiff's claim against Ms. Maksuta is for general damages in the sum of $400,000 and special damages in the sum of $100,000.

[5] The defendant, Kent & Essex Mutual Insurance Company ("Kent & Essex"), provided insurance coverage to the plaintiff. The plaintiff's claim against Kent & Essex is brought under the uninsured/underinsured motorist coverage. That coverage has a policy limit of $100,000.

Position of the Moving Defendant

[6] The moving defendant takes the position that there are no factors that would allow this court to take jurisdiction. In the alternative, if I find that this court has jurisdiction, the moving defendant takes the position that Ontario is not the convenient forum. In either event, the moving defendant takes the position that the claim must be dismissed or stayed as against her.

Analysis

[7] For reasons that I will explain, I have decided to grant the motion and, consequently, stay the action as against Sheila Ruby Maksuta.

Want of Jurisdiction

[8] The moving defendant brings a motion for dismissal or stay for lack of jurisdiction under rule 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides, in salient part:

> (3) A defendant may before a judge to have an action stayed or dismissed on the ground that,
>
> (a) the court has no jurisdiction over the subject matter of the action.

[9] The leading decision on this issue is that of the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, ("*Van Breda*"). In that case, in June 2003, Mr. Berg and his spouse, Ms. Van Breda, went on a trip to Cuba where they stayed at the Super Club's Breezes Jibacoa resort managed by Clubs Resorts. Mr. Berg was a professional squash player and had arranged for a one-week stay through an Ottawa-based travel agent operating a business known as Sport au Soleil. The arrangements were that Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

[10] On the first day of their stay, Ms. Van Breda tried to do exercises on a metal structure on the beach. The structure collapsed. Ms. Van Breda suffered catastrophic injuries and, as a result, became a paraplegic. She spent a few days in hospital in Cuba and returned to

Calgary, Canada where her family lived. Eventually, she moved to British Columbia to live with Mr. Berg. They never returned to Ontario, which they had planned to do after the holiday.

[11] In May 2006, Ms. Van Breda, her relatives, and Mr. Berg sued several defendants including the travel agent, Club Resorts, and some companies associated with Club Resorts in the Super Clubs Group in the Ontario Superior Court. The claim was framed in contract and in tort. Some of the parties, including those who were served outside of Ontario, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court to decline jurisdiction on the basis that Ontario was not the proper forum. The motions judge dismissed the motion, finding that Ontario had jurisdiction by reason that, *inter alia*, the agreement between Mr. Berg and Club Resorts had been concluded in Ontario. He also found that it had not been established that a Cuban court would clearly be a more appropriate forum. The Ontario Court of Appeal dismissed the appeal. The appeal to the Supreme Court of Canada was also dismissed.

[12] LeBel J., at paras. 82- 89, speaking for the Supreme Court of Canada, set out an analytical framework and legal principles for assuming jurisdiction (*jurisdiction simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). I take the following principles from that decision:

1. Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. This means that courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and has been updated as the needs of the system evolve: see *Van Breda*, at para. 82.

2. General principles or objectives of the conflicts system, such as fairness, efficiency or comity, is not included in this list of presumptive connecting factors: see *Van Breda*, at para. 84.

3. The list of presumptive connecting factors proposed by the Supreme Court of Canada relates to claims in tort and issues associated with such claims: see *Van Breda*, at para. 85.

4. The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor: see *Van Breda*, at para. 86.

5. The situs of the tort is clearly an appropriate connecting factor: see *Van Breda*, at para. 88.

6. The use of damage sustained as a connecting factor raises difficult issues. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor: see *Van Breda*, at para. 89.

7. In a case involving a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle the court to assume jurisdiction over a dispute:

   a) the defendant is domiciled or resident in the province;

   b) the defendant carries on business in the province;

   c) the tort was committed in the province; and

   d) a contract connected with the dispute was made in the province.

[13] LeBel J. explained that the list of presumptive connecting factors is not closed. Over time, new connecting factors may be identified as also presumptively entitling the court to assume jurisdiction. In identifying any new presumptive factors, the court must look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the above listed factors. Relevant considerations include:

   a) the similarity of the connecting factor with the recognized presumptive connecting factors;

   b) treatment of the connecting factor in the case law;

   c) treatment of the connecting factor in statute law; and

   d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[14] LeBel J. said, at paras. 93, 94, &100:

> If, however, no recognized presumptive connecting factor – whether listed or new – applies, the effect of the common law real and substantial connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on a case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.
>
> Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor.
>
> …

> To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. … The presumption of jurisdiction that arises where a recognized presumptive connecting factor – whether listed or new – exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine….

[15] The plaintiff's claim against the moving defendant is in tort. The allegations are that the accident was caused by the negligence of the moving defendant. The plaintiff's claim against the other defendant, Kent & Essex, is in contract.

[16] I turn to the presumptive connecting factors set out in *Van Breda*:

1. The moving defendant is not domiciled or resident in Ontario.
2. The moving defendant does not carry on business in Ontario.
3. The tort was not committed in Ontario.
4. There is no contract made in Ontario between the plaintiff and the moving defendant.

[17] Does the insurance contract between Kent & Essex and the plaintiff allow the plaintiff to sue the moving defendant in Ontario? In my view, it does not. The facts in this case are identical to the facts in *Misyura v. Walton*, 2012 ONSC 5397, 112 O.R.(3d) 462,. In that case, while crossing the street in New York State, the plaintiff, a Canadian visiting the United States, was struck by a motor vehicle owned and operated by the defendant. The plaintiff returned to Ontario where she pursued both the defendant for negligence and her own insurance company under the underinsured coverage of her standard motor vehicle insurance policy. The defendant moved to have the plaintiff's action and the insurance company's crossclaim permanently stayed against him on the grounds that the Ontario court did not have *jurisdiction simpliciter*. The plaintiff did not oppose the motion. The insurer did.

[18] Perell J. heard the motion and stayed the main action and the crossclaim. When considering the four connective factors for tort cases, he considered whether the fourth factor was satisfied by the plaintiff's contract with his own insurance company. In the course of his analysis, Perell J. said, at paras. 34 and 37:

> Coming to the situation of the case at bar, it can be seen that none of the four connective factors for tort cases applies, except possibly the fourth factor that there is a contract connected with the dispute. As to the contract factor, Mr. Walton, however, is not a party to the contract between

> Economical and Ms. Misyura, and it would appear that the insurance contract between Ms. Misyura and Economical envisions that she can have her claim against economical determined without joining Mr. Walton as a party to the litigation.
>
> …
>
> Economical submits that Ms. Misyura's contract action must be brought in Ontario and that Economical has a right of subrogation against Mr. Walton. It submits that if the Ontario action is stayed against Mr. Walton, it will have to litigate in two different jurisdictions with the spectre of inconsistent judgments. Essentially, Economical's argument for assumed jurisdiction is that Mr. Walton is a necessary party to the cross-claim and his presence is necessary to avoid a multiplicity of proceedings.

[19] After considering the Ontario Court of Appeal's decision in *Van Breda* [2010 ONCA 84, 98 O.R. (3d) 721], Perell J. said, at para. 39:

> Thus, even if Mr. Walton is a proper party for the main action brought by Ms. Misyura and a necessary party to the cross-claim, a presumptive connecting factor has not been established. Convenience and ad hoc notions of what is fair for Economical do not establish a connecting factor.

[20] The same conclusion was reached by Milanetti J. in a similar case, *Mitchell v. Jeckovich*, 2013 ONSC 7494, [2014] I.L.R. I-5537, ("*Mitchell*"), at para. 43.

[21] Mr. Pickard points out that the underinsured claim against Kent & Essex is a legitimate claim. All issues of liability can be asserted by Kent & Essex. The *Insurance Act*, R.S.O. 1990, c. I.8, at s. 4(1)(c), requires the claim against Kent & Essex be brought in Ontario. If the plaintiff is required to pursue his claim against the underinsured insurer in Ontario and the tortfeasor in Michigan, the result is a multiplicity of proceedings. A multiplicity of proceedings ought to be avoided.

[22] Although all of that is true, there is still no connecting factor that would allow this court to assume jurisdiction. I return to the principles set out by the Supreme Court of Canada in *Van Breda*. LeBel J. discussed the origins and development of the precursor to the analysis set out in *Van Breda*, the "real and substantial connection test." The purpose of the test was to limit the reach of provincial conflicts rules or the assumption of jurisdiction by provincial courts. The desired result was order, consistency, and predictability. The Supreme Court of Canada set out a clear framework to achieve that result. Now, for the Ontario court to assume jurisdiction, there must be a connecting factor that links the subject matter of the litigation to Ontario. The subject of the litigation is the motor vehicle accident that took place in Michigan. Nothing about the insurance contract between the plaintiff and Kent & Essex links the subject matter of the litigation to Ontario as it pertains to the plaintiff's claim against the moving defendant. If I were to conclude otherwise, then every motor vehicle accident involving an Ontarian that occurs in another jurisdiction could be

litigated in Ontario simply by adding the plaintiff's own Ontario insurance company as a defendant. Such a result would be to broaden the reach of provincial conflicts rules, which is contrary to the whole purpose of the test.

[23] Accordingly, I cannot find that a connecting factor exists in so far as the moving defendant is concerned. The result is my conclusion that Ontario does not have *jurisdiction simpliciter* over the action against the moving defendant.

[24] Jurisdiction not having been established, it is not necessary to consider the *forum non conveniens* argument. However, it is necessary to consider the plaintiff's argument that Ontario is a forum of necessity for his claim.

Forum of Necessity

[25] In *Van Breda*, at para. 86, the Supreme Court of Canada noted that the forum of necessity was not at issue in the appeal and declined to discuss it.

[26] Mr. Pickard points out that the plaintiff suffered a traumatic brain injury. The plaintiff was hit by the defendant's motor vehicle in a crosswalk, and it is likely that liability will not be a serious issue. The limit of the Kent & Essex's policy for underinsured and uninsured coverage is $100,000. It is likely the plaintiff's damages will be greater than this amount. The action was commenced in Ontario within the limitation period legislated both in Ontario and in Michigan.

[27] In my view, the plaintiff ought to have commenced two actions – a tort action in Michigan against the moving defendant and a contract action in Ontario against Kent & Essex. That course of action is no longer available given the expiration of the limitation period in Michigan. The plaintiff asserts that these circumstances permit this court to take jurisdiction under the forum of necessity.

[28] Mr. Pickard points to communications between the plaintiff's counsel and counsel for the moving defendant in October 2018. The first communication was on October 15, 2018, when Ms. Gardin, the plaintiff's counsel, sent an e-mail to Mr. Hatch, the moving defendant's counsel, identifying three issues. The second issue she identified was, "[W]hether you plan to challenge jurisdiction." The response from Mr. Hatch, on the same day, was, "My client does wish to contest jurisdiction. However, we would be happy to engage in early settlement discussions." Counsel discussed the issues with each other during a telephone conversation the next day, on October 16, 2018.

[29] Mr. Pickard suggests that, based on the concept of fairness, it was incumbent on the moving defendant to bring the motion on the jurisdiction issue prior to the expiration of the limitation period in Michigan. The moving defendant did not bring the motion until its first return date of February 4, 2020. Mr. Pickard asserts that plaintiff's counsel was lulled into a false sense of security from the invitation to engage in early settlement discussions.

[30] In the Ontario Court of Appeal decision in *Van Breda*, Sharpe J.A. discussed the form of necessity doctrine. At para. 100, he said:

> The forum of necessity doctrine does not redefine real and substantial connection to embrace "forum of last resort" cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

[31] The forum of necessity was addressed by Mulligan J. in the 2015 decision of *Cook v. 1293037 Alberta Ltd.*, 2015 ONSC 7989, ("*Cook*"). In that case, the plaintiff claimed to have suffered injuries from a slip and fall at the defendant's hotel in Alberta. The plaintiff was working as a temporary worker in Alberta at the time. The plaintiff commenced the action in Ontario. The defendant moved to stay the Ontario action on the basis that the case had no real and substantial connection to Ontario and Alberta was the more appropriate forum.

[32] Mulligan J. held that *jurisdiction simpliciter* had not been established in Ontario. He went on to address the forum of necessity doctrine and reviewed the available jurisprudence at the time, ultimately determining that the forum of necessity doctrine was not applicable. I take the following from his analysis:

1. The forum of necessity doctrine is an exception to the real and substantial connection test. It recognizes that there will be extraordinarily and exceptional cases where the need to ensure access to justice will justify the domestic court's assumption of jurisdiction: see *Cook*, at para. 20, and *Forsythe v. Westfall*, 2015 ONSC 758, ("*Forsythe*")

2. The exception is very narrow, and the plaintiff must establish that there is no other forum in which he or she reasonably could obtain access to justice. Typically, the doctrine is unavailable because of its high bar and its availability has been rejected in numerous cases. The doctrine is reserved for exceptional cases such as where there has been a breakdown in diplomatic or commercial relations with the foreign state or where the plaintiff would be exposed to a risk of serious physical harm if the matter was litigated in the foreign court: see *Cook*, at para. 20.

3. For Ontario to accept jurisdiction as the "forum of necessity" the appellant must establish that there is no other forum in which she can reasonably seek relief: see *Cook*, at para. 21, and *Forsythe*.

4. The expiry of the limitation period in the proper foreign forum does not make Ontario the forum of necessity: see *Cook*, at para. 23, and *West Van Inc. v. Daisley*, 2014 ONCA 232.

[33] In *Mitchell*, Milanetti J., at para. 49, considered the doctrine in a case where the limitation period in the proper foreign jurisdiction had expired:

> That being said, I do not accept that I should be relying on a perhaps tactical decision on the part of plaintiff's counsel not to commence an action in the appropriate jurisdiction, to engage the forum of necessity doctrine and assume jurisdiction despite the absence of a real and substantial connection. I do not believe that a missed limitation period, which I add could have been avoided, is an exceptional circumstance warranting the use of residual discretion. To borrow language from the Supreme Court in *Van Breda*, doing so, I believe, would "undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system" [Citation omitted.]

[34] In my view, the circumstances present in this case militate against the application of the doctrine of forum of necessity. The plaintiff chose not to issue a statement of claim in Michigan. Plaintiff's counsel was told by defence counsel in October 2018 that the moving defendant contested this court's jurisdiction. There was no evidence that the issue was raised again between counsel. There was no evidence that defence counsel took any steps to lull the plaintiff into a false sense of security. Given the e-mail communication that took place on October 15, 2018, I can only conclude that plaintiff's counsel was aware that the moving defendant was contesting jurisdiction and that the limitation period in Michigan would expire in August 2019. Given that information, the plaintiff ought to have issued a claim in Michigan and did not.

[35] Counsel for the plaintiff suggests that it was incumbent on the moving defendant to bring the motion prior to the expiration of the limitation period in Michigan. I would not put that responsibility on the moving defendant. This is the plaintiff's case. The plaintiff must pursue it. The plaintiff was aware that jurisdiction was an issue. The plaintiff did nothing to pursue his case within the limitation period in Michigan. I fail to see how this is the moving defendant's fault.

[36] Plaintiff's counsel has provided cases where a different conclusion was reached. In *Ibrahim v. Robinson*, (September 18, 2013), Windsor CV-10-14221 (S.C.), appeal dismissed, 2015 ONCA 21, 124 O.R. (3d) 106, Rogin J. allowed an action to proceed in Ontario for injuries suffered as a result of a motor vehicle accident that took place in Michigan just across the border. Rogin J. found that there were no presumptive connecting factors that would result in *jurisdiction simpliciter*. Rogin J. found, in that case, that the defendant had purposely delayed serving the notice of motion until the expiration of the limitation period in Michigan, effectively denying the plaintiffs access to the Michigan Courts. He found that the defendants lulled the plaintiffs into a false sense of security. I distinguish the case on the facts. In the case at hand, in my view, the moving defendant did not lull the plaintiff into a false sense of security. Rather, counsel for the moving defendant specifically told counsel for the plaintiff that jurisdiction was in issue ten months before the expiration of the limitation period in Michigan.

[37] The plaintiff also relies on the case of *Gordon v. Deiotte* 2012 ONSC 1973, 109 O.R. (3d) 626. This case also dealt with plaintiffs who were injured in a motor vehicle accident in Michigan and commenced their action in Ontario. The decision in that case was released on April 3, 2012. The motions judge found that the Ontario court had *jurisdiction simpliciter*. The decision was not based on the doctrine of forum of necessity. I do not find this decision helpful as it was released just two weeks prior to the Supreme Court of Canada's decision in *Van Breda*, and, accordingly, the trial judge did not have the benefit of the Supreme Court's analysis.

[38] In conclusion, there are no "rare and exceptional circumstances" to find forum of necessity. To find otherwise would mean that the application of the forum of necessity doctrine is triggered when the limitation period had expired in the foreign jurisdiction. Such a conclusion would, in my view, be contradictory to the objectives espoused by the Supreme Court of Canada, namely: order, certainty, and predictability for a fair and principled private international law system.

Disposition

[39] For these reasons, I find that the action against the defendant, Sheila Ruby Maksuta, is stayed.

[40] In the event counsel are unable to agree on costs, they may provide brief written submissions, to include a costs outline, on the following timeline:

1. The moving defendant shall have 20 days;

2. The plaintiff shall have 20 days thereafter;

3. The moving defendant shall have 10 days thereafter for reply.

Original signed by *Justice Pamela L. Hebner*
Pamela L. Hebner
Justice

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Hebner J.

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