CITATION: Strapper v. Taylor, 2021 ONSC 243
COURT FILE NO.: CV-18-5004
DATE: 20210113

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
INGRID STAPPER and JOHN ESMOND STAPPER by his Litigation Guardian INGRID STAPPER	)	Todd A. Reybroek, for the Plaintiff
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
KIESHA TAYLOR, E.W. JACKSON TRANSPORTATION LLC, RAAD SHAKIR and SECURITY NATIONAL INSURANCE COMPANY	)	David R. McKenzie and Lucas J. Kittmer, for Kiesha Taylor and E.W. Jackson Transportation LLC
	)	
	)	Navin Ghahraei, for the Defendant Security National Insurance Company
	)	
Defendants	)	
	)	
	)	**HEARD:** December 3, 2020

REASONS FOR JUDGMENT

J.M. WOOLLCOMBE J.

Introduction

[1] The plaintiffs' action is as a result of injuries they sustained in two motor vehicle accidents: one on November 21, 2016 in the City of Stockbridge, Georgia,

USA (the “Georgia accident”) and the second on April 10, 2017 in the City of Mississauga, Ontario (the “Ontario accident”). The action was commenced by a Statement of Claim, issued on November 21, 2018. The Statement of Claim was amended on January 15, 2019. It was then served on the defendants Security National Insurance Company (the plaintiffs’ insurer) and Raad Shakir (the driver of the other car in the Ontario accident). Both of these defendants have filed statements of defence and cross-claims.

[2] The plaintiffs did not serve the defendant Keisha Taylor with the Statement of Claim until February 18, 2020. The plaintiffs then brought a motion for an order validating service of the Statement of Claim and extending time for service to February 18, 2020.

[3] The defendants Keisha Taylor and E.W. Jackson Transportation LLC (“E.W. Transportation”) responded with a cross-motion. They seek an order dismissing the action against them on the basis that the Ontario court does not have jurisdiction over them or, in the alternative, does not have jurisdiction over the claim against them. In the further alternative, they say that the action should be dismissed or stayed on the basis that Ontario is not the convenient forum for this action.

[4] The parties agree that the first issue to be decided on this motion is whether the Ontario court has jurisdiction over the claim against Ms. Taylor and E.W. Jackson Transportation LLC . If it does, the next issue is whether Ontario is the convenient forum for this action.

Factual Background

The Georgia accident

[5] The Georgia accident occurred on November 21, 2016, on the I-75 near Hudson Bridge in Stockbridge, Georgia. The defendant Ms. Taylor was driving an

18-wheeler transport truck owned by her employer, E.W. Transportation. She was driving the truck in the course of her employment duties. Attached to the truck was a trailer, also owned by E.W. Transportation.

[6] Ms. Taylor is an American citizen who has been living in North Carolina since 2014. She has never been to Canada and does not have an American passport.

[7] E.W. Transportation was owned by Vinson Jackson, an American citizen who lived in North Carolina. He has never been to Canada.

[8] E.W. Transportation was a transportation / trucking company that hauled freight for customers using two tractor trailer units and a trailer. It entered into contracts with customers to pick up and deliver freight. It provided freight carriage services, essentially acting as a “trucker for hire”, exclusively in the United States.

[9] E.W. Transportation was a limited liability corporation incorporated pursuant to the laws of North Carolina. It had no office in Canada, conducted no business in Canada and did not market its services to Canadians. It had no direct connection with any business or commercial enterprise in Canada.

[10] E.W. Transportation was dissolved on October 16, 2018. However, it faces the possibility of an over-limits judgment, as a result of which its former owner, Mr. Jackson, has an interest in the plaintiffs’ claim.

[11] On November 23, 2016, the plaintiff Ingrid Stapper sought treatment for her injuries from the Georgia accident at Oakville Trafalgar Memorial Hospital.

The Ontario accident

[12] Less than five months after the Georgia accident, on April 10, 2017, the plaintiffs were involved in the Ontario accident with the defendant Raad Shakir.

The plaintiff's long term disability claim

[13] On March 25, 2020, the plaintiff Ingrid Stapper commenced a separate action against RBC Life Insurance Company respecting her Long-Term Disability claim.

Service of the Statement of Claim

[14] On November 24, 2018, the plaintiffs' process server attempted to serve Ms. Taylor with the Statement of Claim at an address in Cameron, North Carolina. The process server advised that she did not live there.

[15] On August 26, 2019, counsel for the plaintiffs requested that a process servicer in the United States serve Ms. Taylor with the Statement of Claim in accordance with the Hague Convention. On November 12, 2019, the process server was unable to locate Ms. Taylor at the address provided, but found a new possible address for her. On January 13, 2020, counsel requested that Ms. Taylor be served at that address in accordance with the Hague Convention. On February 18, 2020, the Statement of Claim was served on Ms. Taylor by leaving it with a co-resident of hers, who accepted service at an address in Fayetteville, North Carolina.

Analysis

[16] On this jurisdiction motion, there are two issues to be decided. First is the question of whether the Ontario court is entitled to assume jurisdiction over the foreign dispute, in this case the Georgia claim. This is referred to as "jurisdiction *simpliciter*". It turns on whether there is a "real and substantial connection" between the circumstances giving rise to the claim and the jurisdiction in which the claim is brought.

[17] If jurisdiction is established in Ontario, the second question is whether the court should exercise its discretion to decline to exercise its jurisdiction. This is referred to as an analysis of "*forum non conveniens*": *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at paras. 25-26, 51; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 ("*Van Breda")*.

[18] I shall consider these two issues separately.

Is Ontario entitled to assume jurisdiction over the Georgia claim?

[19] The party arguing that the court should assume jurisdiction has the burden of identifying a connecting factor between the litigation and the forum.

[20] In *Van Breda*, the court set out four "presumptive connecting factors" that enable a court to assume jurisdiction:

i) The defendant is domiciled or resident in the province;

ii) The defendant carries on business in the province;

iii) The tort was committed in the province; and

iv) A contract connected with the dispute was made in the province.

[21] In *Van Breda*, Lebel J. set out some factors that are not presumptively connecting. The presence of the plaintiff, on its own, is not a sufficient presumptive connecting factor: para. 86. Similarly, the fact that damages were sustained in the jurisdiction is not a presumptive connecting factor: para 89. Further and importantly, courts were directed not to assume jurisdiction on the basis of the combined effect of a number of non-connecting factors: para. 93.

[22] However, as the plaintiffs point out, Lebel J. explained in *Van Breda* that the list of presumptive connecting factors is not closed and that over time, courts may identify new factors which also, presumptively, entitle a court to assume

jurisdiction. In doing so, courts are to "look to connections" that give rise to a relationship with the forum that are similar in nature to the ones which result from the listed factors including:

(a) 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.

[23] *Van Breda* provides guidance to courts considering whether a new connecting factor should be given presumptive effect at paras. 92-94:

> 92 When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.
>
> 93 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 nonpresumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the 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.
>
> 94 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…

[24] Ms. Taylor and E.W. Transportation take the position that none of the presumptive connecting factors identified in *Van Breda* are present in this case. Ms. Taylor is an American citizen and resident. E.W. Transportation was incorporated in the United States. Neither defendant was domiciled or resident in Ontario. Ms. Taylor worked exclusively in the United States and E.W. Transportation did no business in Ontario or in Canada. The accident occurred in the United States. No contract connected with the dispute was made in Ontario.

[25] It is clear that presumptive connecting factors (ii), (iii) and (iv) do not apply here. The fact that the plaintiffs' insurer is named as a defendant "is not a sufficient presumptive connecting factor giving the court jurisdiction over the dispute and the non-resident defendants, and that the inclusion of a claim against the plaintiff's automobile insurer should not serve to "bootstrap" jurisdiction over the non-resident defendants": *Khan v. Layden*, 2014 ONSC 6868; *Tamminga v. Tamminga*, 2014 ONCA 478 at paras. 1 and 27.

[26] The plaintiffs rely on the decision of Edwards J. in *Cesario v. Gondek*, 2012 ONSC 4563 ("*Cesario")* in support of their position that a new presumptive connecting factor was created where one of multiple defendants is resident or domiciled in Ontario, even if the other defendant(s) are not.

[27] In *Cesario*, the Ontario plaintiffs were a husband, who was the driver, and his wife, who was the passenger. They were involved in two motor vehicle accidents; the first in New York State and the second in Ontario. Both plaintiffs claimed against the New York driver for the New York accident, the Ontario driver for the Ontario accident and their Ontario insurer. In addition, the wife made a claim against her husband as the driver in both accidents. Edwards J. considered a motion by two of the New York defendants to stay the action against them in

Ontario because there was no connecting factor between them and the Ontario action.

[28] He characterized this issue before him as:

> 23…raises for determination whether the Supreme Court of Canada in *Van Breda* was referring to "the defendant" being domiciled or resident in the province as being the moving defendant or whether any defendant in the action domiciled or resident in the province was sufficient for a connecting factor. The answer to this question can be found in paragraph 99 of *Van Breda* which provides:
>
> > I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.
>
> 24 If the position of the New York defendants was accepted, the plaintiffs could be forced to litigate three separate actions; one of which would be heard in the State of New York and two of which would be heard in the Province of Ontario. Such a situation would, adopting the language of *Van Breda*, "breach the principles of fairness and efficiency on which the assumption of jurisdiction is based". In addition, adopting the concluding words of LeBel J. in *Van Breda*: "...keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split." It would raise the real and quite unjust prospect of inconsistent verdicts.

[29] As a result, Edwards J. concluded, at para. 28:

> 28 The principle of fairness and justice referenced by LeBel J. in *Van Breda* causes this court to conclude that where there are multiple defendants, at least one of whom is resident in the Province of Ontario, or domiciled in the Province of Ontario (as is the case on the facts before this court i.e., the defendant Domenic Cesario, the defendant Elizabeth Ruth Stoutz, and the defendant Security National Insurance Company) then there is a sufficient real and substantial connection existing such that the court should assume jurisdiction over all aspects of the case, including that aspect of the case involving the New York defendants.

[30] The plaintiffs submit that that same reasoning applies in this case.

[31] The defendants, however, say that *Cesario* is distinguishable from this case because in *Cesario,* one of the defendants (the husband) in the New York action was an Ontario resident. Had Ontario not assumed jurisdiction for this action, there was a possibility of it being split and litigated in both New York and Ontario. By contrast, the defendants say that all of the defendants in the Georgia action are resident in the United States.

[32] Courts since *Cesario* have disagreed about the scope of Edwards J.'s decision. The plaintiffs rely on Skarica J.'s view that Edwards J. created a new presumptive connecting factor for assuming jurisdiction where one of multiple defendants are resident in Ontario: *Mannarino v. Brown Estate*, 2015 ONSC 3167 at para. 33 ("*Mannarino")*. Other courts have found that Edwards J. was merely applying the first presumptive connecting factor identified in *Van Breda* (*Best v. Palacios,* 2016 NBCA 59 at paras. 19-20; *Mitchell v. Jeckovich*, 2013 ONSC 7494 at para. 35 ("*Mitchell")*).

[33] In my view, the facts in *Cesario* are different from those before me. In that case, one of the defendants in the New York action, the husband, was a resident in Ontario. Where there were multiple defendants to the action, some in the United States and some in Ontario, it made sense for Ontario to have jurisdiction over the action, on the basis of the first presumptive connecting factor. I agree with Ms. Taylor and E.W. Transportation that this is plainly not the case here.

[34] I am not persuaded that where there is no defendant in Ontario, any of the four presumptive connecting factors that would give rise to Ontario having jurisdiction is present in this case: *Mannarino* at paras 36-38. Nor do I find that there the court should recognize a new connecting factor on the facts before me. I find that Ontario does not have jurisdiction over the Georgia accident.

[35] The troubling result of this conclusion is that the plaintiffs will be unable to pursue the defendants in a Georgia action because the limitation period for Georgia has expired. I understand that this will preclude the plaintiffs from beginning a new action in Georgia.

[36] My colleagues in both *Mannarino* at paras. 40-42 and *Mitchell* considered such a circumstance and addressed whether to apply the doctrine of necessity. As Milanetti J. stated in *Mitchell* at paras. 45-49:

> 45 The thorny issue in the case before me is the passage of the New York limitation period. It is clear that if this case were to be dismissed for lack of jurisdiction, the plaintiff's American action would be statute barred, and she would be left with a $100,000 deductible in her contract dispute with Pembridge with no means to fill that gap. Does this amount to necessity such that this court must assume jurisdiction even if the real and substantial test has not been satisfied?
>
> 46 The Court of Appeal's commentary on the forum of necessity doctrine in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 (Ont. C.A.), was left largely untouched by the Supreme Court. The Court of Appeal wrote the following on this doctrine at paragraph 100:
>
> > ...The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace "form 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. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test.
>
> 47 The only case provided to me by counsel was the decision of Justice Kenneth Campbell in Elfarnawani v. International Olympic Committee & Ethics Commission, 2011 ONSC 6784 (Ont. S.C.J.) ("Elfarnarwani"). In that decision, Justice Campbell denied jurisdiction, and went on to consider the missed limitation period as a potential basis for the forum of necessity analysis.
>
> 48 In *Elfarnawani*, Justice Campbell was unable to conclude that there was no other forum in which the plaintiffs could reasonably seek relief. I do not have that

> situation. I have been persuaded that a New York action would be barred at this stage.
>
> 49 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" (*Van Breda*, para. 93).

[37] I have not been asked by the plaintiffs to invoke the doctrine of necessity. In any event, I do not think it would be appropriate to do so. There is a high bar for the plaintiffs to meet in order for the court to assume jurisdiction through the necessity doctrine: *West Van Inc v. Daisley,* 2014 ONCA 232 at para 34. I cannot conclude that when the plaintiffs missed their limitation period, which could have been avoided, there is an exceptional circumstance such that they should be permitted to rely on this doctrine in order for this action to be tried in Ontario.

If Ontario had jurisdiction, would it be the convenient forum?

[38] Since I have concluded that Ontario does not have jurisdiction over the Georgia accident, it is not, strictly speaking, necessary to address the issue of *forum non conveniens*. However, for the sake of completeness, and in the event that I am wrong about jurisdiction, I will consider this issue.

[39] Had jurisdiction been established, the burden would have been on the defendants to show why the court should decline to exercise its jurisdiction and displace the forum selected by the plaintiffs on the basis of the *forum non conveniens* doctrine. *Van Breda* provides that the defendants have to show that another forum is preferred and is clearly more appropriate: paras. 103; 118. The defendants must show that it would be fairer and more efficient to proceed in the other jurisdiction.

[40] In *Churchill Cellars Ltd. v. Haider,* 2018 ONSC 2013; aff'd 2019 ONSC 1143, Master McGraw set out at paras. 27-28 a non-exhaustive factors in this analysis:

> (i) the location of the majority of the parties;
>
> (ii) the location of the key witnesses and evidence;
>
> (iii) contractual provisions that specify applicable law or accord jurisdiction;
>
> (iv) the avoidance of multiplicity of proceedings;
>
> (v) the applicable law and its weight in comparison to the factual questions to be decided;
>
> (vi) geographical factors suggesting the natural forum; and
>
> (vii) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court (*Young v. Tyco International of Canada Ltd.* (2008), 92 O.R. (3d) 161 (Ont. C.A.) at paras. 25-26; *James Bay* at para. 31).

[41] In this case, there are parties in both jurisdictions. The defendant Ms. Taylor and theformer owner of E.W. Transportation, Mr. Jackson, are in the United States. The plaintiff Ms. Stapper is in Ontario.

[42] There would be witnesses for the Georgia action in both jurisdictions. The accident was in Georgia and any witnesses to it are there, including the police officer who attended. At the same time, the plaintiff did not seek medical treatment until she was back in Ontario. All of the evidence about the extent of the plaintiffs' damages would be from witnesses in Ontario. This would include treating physicians and professionals, friends, family and co-workers as well as her employer: *Khan v. Layden,* 2014 ONSC 6868 at paras. 28-29. It seems to me like the preponderance of the evidence would come from Ontario witnesses. It would be more difficult and expensive for the plaintiff to arrange for them to testify in Georgia.

[43] The defendants submit that the majority of evidence and witnesses would be in the United States, including Ms. Taylor's training records, employment files and maintenance records. While I accept that there would be evidence and a few witnesses in the United Stated, in my view the preponderance of witnesses for the Georgia accident are in Ontario. In any event, I am not satisfied that the defendants have shown that this factor clearly points towards Georgia as the better forum.

[44] There are no contractual provisions that specify the applicable law or accord jurisdiction. Thus this factor cannot favour Georgia.

[45] If this action were to proceed in Georgia, there would be, as the plaintiffs and Security National Insurance Company point out, multiple proceedings. On the Georgia accident, there would be issues respecting liability and damages. The plaintiffs would also need to demonstrate to their insurer that the damages award was in accordance with the law in Ontario, failing which there might be an issue respecting underinsured coverage for the Georgia accident. In addition, the plaintiffs would have an action against the Ontario defendant respecting damages from the Ontario accident. This factor cannot favour the action proceeding in Georgia.

[46] Not only would having the action tried in Georgia lead to more proceedings, there is also a potential for inconsistent findings respecting the apportionment of liability for damages. This is a significant disadvantage to the plaintiff and this factor favours one proceeding, and does not demonstrate that the action should proceed in Georgia.

[47] The parties did not make any additional submissions respecting the most appropriate forum.

[48] Weighing all the factors, it is my view that had Ontario had jurisdiction over the Georgia action, the defendants have not demonstrated that Georgia is clearly the more appropriate forum in which to try the action. I would, therefore, have declined to accede to the defendants' position that the action in Ontario should be stayed on this basis, and would have held that it should proceed in Ontario.

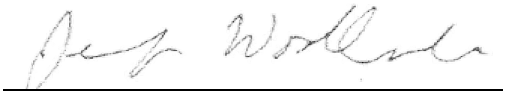
Conclusion

[49] As a result of my conclusion respecting jurisdiction, the action against Ms. Taylor and E.W. Transportation is dismissed.

Costs

[50] After the hearing of the motion, the parties each submitted bills of costs. They are encouraged to settle the issue of costs as between them. If they are unable to do so, I shall decide the issue on the basis of written submissions.

[51] As the successful party, the defendants Ms. Taylor and E.W. Transportation are presumptively entitled to their costs. They shall have two weeks from the release of this judgment to serve and file not more than three pages of costs submissions, in addition to their bill of costs and any jurisprudence. The plaintiffs and defendant Security National Insurance Company will have an additional ten days to respond with submissions of the same length. There will be no reply without leave of the court.



Woollcombe J.

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REASONS FOR JUDGMENT

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